83-498
NO.

Office-Supreme Court, U.S.
FILED
SEP 23 1983
ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARTIN DANZIGER, ACTING CHAIRMAN; DONALD THOMAS, COMMISSIONER; MADELINE McWHINNEY, COMMISSIONER; CARL ZEITZ, COMMISSIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY; G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

JOINT APPENDIX TO JURISDICTIONAL STATEMENTS

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Dated: September, 1983

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APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-5210, 82-5234 and 82-5260

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54; and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL 331,

Intervenor

v.

MARTIN DANZIGER, ACTING CHAIRMAN; DONALD THOMAS, COMMISSIONER; MADELINE MC WHINNEY, COMMISSIONER; CARL ZEITZ, COMMISSIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY; G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY

Hotel and Restaurant Employees and Bartenders International Union Local 54 and Frank Gerace, President, Hotel and Restaurant Employees and Bartenders International Union Local 54,

Appellants in No. 82-5210

Appendix A

The Casino Control Commission,
Appellant in No. 82-5234

G. Michael Brown, Director, Dept. of Law and Public Safety, Division of Gaming Enforcement; and Thomas Kean, Governor,
Appellants in No. 82-5260

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY — CAMDEN

(D.C. Docket No. 81-2630)

Argued November 15, 1982

Before: GIBBONS, HIGGINBOTHAM and BECKER, *Circuit Judges*

(Opinion filed June 6, 1983)

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OPINION OF THE COURT

GIBBONS, *Circuit Judges:*

Hotel and Restaurant Employees and Bartenders International Union No. 54 (the Union) and its president, Frank Gerace appeal from an order of the district court denying their motion for a preliminary injunction

against enforcement of certain provisions of the New Jersey Casino Control Act, N.J. State Ann. 5:12-1 to -152 (West Supp. 1982).[1] The defendants are members of the New Jersey Casino Control Commission (the Commission) and officials of the New Jersey Department of Law and Public Safety, Division of Gaming Enforcement (the Division.) The Commission and the Division cross-appeal from the denial of their motions to dismiss the complaint. We hold that we lack appellate jurisdiction over the cross-appeals. With respect to the Union's appeal we vacate the denial of the motion for a preliminary injunction and remand for further proceedings consistent with this opinion.

I.

Parties and Proceedings in the District Court

The Union is an unincorporated labor organization within the meaning of section 2(5) of the National Labor Relations Act, (NLRA) as amended. 29 U.S.C. §152 (1976). It has approximately 12,000 members of whom over 8,000 are employed as waiters, waitresses, bartenders, cooks, kitchen help, housekeepers and other hotel service employees in those establishments in Atlantic City, New Jersey, licensed to operate gambling casinos. The Union has been duly certified by the National Labor Relations Board (the Board), pursuant to section 9 of the NLRA, 29 U.S.C. §159 (1973), as the representative of those employees for purposes of collective bargaining. It is similarly certified for employees of other businesses in southern New Jersey which do not hold gambling casino licenses. The Union participates on behalf of its members in the Hotel and Restaurant Employees and Bartenders International Union Pension Fund, and its

1. The district court opinion is reported. Hotel and Restaurant Employees and Bartenders International Union Local v. Danzinger (sic), 536 F.Supp. 317 (D.N.J. 1982).

Health and Welfare Fund. Both of these funds are employee benefit plans within the meaning of the Employee Retirement Income Security Act of 1974 (ERISA), as amended. 29 U.S.C. §1001-1381 (1976). President Frank Gerace is a trustee of those funds.

In 1977 the New Jersey Legislature passed the Casino Control Act (the Act), which authorizes the licensing of hotels in Atlantic City for casino gambling. That act establishes a Casino Control Commission with broad regulatory authority over casinos and related industries. N.J.Stat. Ann. 5:12-63 to -75 (West Supp. 1982) It also establishes in the Department of Law and Public Safety, which the Attorney General heads, a Division of Gaming Enforcement, charged with responsibility for investigating all applicants for licenses, certificates, or permits, and prosecuting before the Commission or in the state criminal courts all proceedings for violation of the Act or regulations promulgated under it. N.J.Stat. Ann. 5:12-76 to -79 (West Supp. 1982). The Act requires licensing not only of casinos, but of casino key employees (supervisors), N.J.Stat. Ann. 5:12-89 (West Supp. 1982), and of casino employees. N.J.Stat. Ann. 5:12-90 (West Supp. 1982). Casino hotel employees include those performing "service or custodial duties not directly related to operations of the casino, including, without limitations, bartenders, waiters, waitresses, maintenance personnel, kitchen staff, but whose employment duties do not require or authorize access to the casino." N.J.Stat. Ann. 5:12-8 (West Supp. 1982). For casino hotel employees the Act requires registration. N.J.Stat. Ann. 5:12-91 (West Supp. 1982). Section 86 of the Act lists criteria for the disqualification of casino licensees, and the section dealing with registration of casino hotel employees authorizes the Commission to revoke, suspend, limit or otherwise restrict the registration of any such employee who would be disqualified for a license. N.J.Stat. Ann. 5:12-86, -91(b) (West Supp. 1982). All industries offering goods or services to the casinos must

also be licensed and are subject to the disqualification criteria of section 86. N.J.Stat. Ann. 5:12-92 (West Supp. 1982).

Particularly relevant to this case is the provision in section 93 of the Act, requiring that every labor organization seeking to represent employees licensed or registered under the Act and employed at a casino hotel register with the Commission annually. N.J.Stat. Ann. 5:12-93(a) (West Supp. 1982). Section 93 also provides:

> No labor organization, union or affiliate registered or required to be registered pursuant to this section and representing or seeking to represent employees licensed or registered under this act may receive any dues from any employee licensed or registered under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent, or principal employee of the labor organization, union or affiliate is disqualified in accordance with the criteria contained in section 86 of this act. The commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require.

N.J.Stat. Ann. 5:12-93(b) (West Supp. 1982). Thus section 93 cross-references to the disqualification criteria in section 86. The criteria include convictions of a list of designated offenses or "any other offense which indicates that licensure of the applicant would be inimical to the policy of this act and to casino operations." N.J.Stat. Ann. 5:12-86(c)(4) (West Supp. 1982). They also include:

> The identification of the applicant or any person who is required to be qualified under this act as a condition of a casino license as a career offender or a member of a career offender cartel or an associate of a career offender or career offender cartel in such a

> manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this act and to gaming operations. For purposes of this section, career offender shall be defined as any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this State. A career offender cartel shall be defined as any group of persons who operate together as career offenders.

N.J.Stat. Ann. 5:12-86(f) (West Supp. 1982). A union may be disqualified under section 93, therefore, if an officer, agent or principal employee is an "associate of any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of [New Jersey]."

In 1978 the Union filed with the Commission the annual registration statement required by section 93(a). Thereafter the Division of Gaming Enforcement conducted an investigation, and reported to the Commission that in its view Frank Gerace, President, Robert Lumino, Secretary-Treasurer, and Frank Materio, Grievance Manager, were disqualified under the criteria of section 86. The Division requested the Commission to prevent the Union from collecting dues from or administering pension or welfare funds on behalf of employees in the casino hotels. The Commission determined to hold a hearing on the Division's report. At a prehearing conference on June 1, 1981 counsel for the Union raised objections to the constitutionality of sections 86 and 93. The Commission requested briefing on the question of its authority to rule upon such objections, and on August 5, 1981 it ruled that since it was not a court it lacked competence to consider them. The Commission then fixed September 9, 1981 as the date for commencement of an evidentiary hearing on disqualification. Counsel for

the Union advised the Commission of his client's intention to file a challenge to the constitutionality of sections 86 and 93 in the federal court before that date.

On August 17, 1981 the Union and Mr. Gerace filed a verified complaint. The complaint alleged that the Division was seeking to have the Commission impose the sanctions set forth in section 93(b) of the Act, but that section 93 was an attempt to regulate areas which are preempted by the NLRA and by ERISA. It alleged, further, that section 93 impermissibly interferes with federally guaranteed rights of employees of the casino and casino hotel industries with respect to the selection of their exclusive collective bargaining agent. An amended complaint alleged that sections 93 and 86 are preempted by the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), as amended. 29 U.S.C. §§401-530 (1976). The complaint also alleged that section 86(f) is both unconstitutionally overbroad and unconstitutionally vague and thus violates the first, fifth and fourteenth amendments of the Constitution. The plaintiffs sought a declaratory judgment that both sections are void, as well as temporary and permanent injunctive relief against the enforcement of section 93. Plaintiffs also filed a motion seeking preliminary injunctive relief, supported by an affidavit alleging that it would be irreparably injured by being forced to participate in proceedings in violation of section 7 of the NLRA.

The Commission acceded to a request by the district court that it defer commencement of its disqualification hearing until the motion for a preliminary injunction was decided. On December 1, 1981 a hearing was held on that motion. At the hearing the Union presented affidavits together with supporting exhibits which were accepted in evidence as uncontroverted by the Commission or the Division. Defendants also placed certain exhibits in evidence. Thereafter both the Commission and the Division moved to dismiss the complaint "on the ground of abstention." On March 22, 1982 the district

court considered both motions in an opinion containing findings of fact and conclusions of law. The court's findings of fact are quoted in the margin.[2]

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2. The court found:

The facts essential to the determination of the motion are as follows:

1. Plaintiff Hotel and Restaurant Employees and Bartenders International Union Local 54 is an unincorporated labor organization within the meaning of §2(5) of the National Labor Relations Act, as amended, *infra*, representing, *inter alia*, about 8,000 licensed employees of the casinos and casino hotels in Atlantic City, New Jersey, in collective bargaining and other matters affecting employer-employee relations. Plaintiff Frank Gerace is president of Local 54.

2. Frank Gerace is a trustee of the Hotel Employees and Restaurant Employees and Bartenders International Union Pension Fund, as well as the Hotel Employees and Restaurant Employees and Bartenders International Union Health & Welfare Fund. Local 54, through its officers, participates in the operation of these funds, both of which are employee benefit plans within the meaning of the Employee Retirement Income Security Act of 1974, *infra*. (Plaintiffs' Exhibit 5).

3. Local 54 filed its annual registration statement as required by the Casino Control Act in 1978. On May 12, 1981, the defendant Division of Gaming Enforcement, following its investigation of the applicant, stated its objections to the application. (Plaintiffs' Exhibit 2).

4. The Casino Control Commission thereupon ordered that hearings on the subject of Local 54's registration commence on September 9, 1981. (Affidavit of Frank Gerace, August 17, 1981, ¶2; Defendants' Exhibit 3).

5. Local 54 has posed to the Casino Control Commission certain of its objections to the registration requirement, the conduct of its officers being the subject of a hearing, and to the possibility that the sanctions of §93 of the Casino Control Act may be imposed. (Plaintiffs' Exhibit 4). The Commission has held that it is without jurisdiction to reach the constitutional objections to §93. (Plaintiffs' Exhibit 4).

6. The Casino Control Commission has adjourned the hearing scheduled for September 9, 1981, pending determination of the instant motion for preliminary relief. (Defendants' Exhibit 3).

536 F.Supp. at 324.

Appendix A

In support of their motions to dismiss, the Commission and the Division relied upon *Younger v. Harris*, 401 U.S. 37 (1971), and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Although their motions sought an outright dismissal of the complaint, they also relied on Railroad *Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The district court stated that neither the Younger nor the Burford doctrines applied and that the nature of the Union's challenges to sections 93 and 86 precluded Pullman abstention. No order was entered denying the defendants' motions.

In ruling on the motion for a preliminary injunction the district court opined that the plaintiffs were not likely to succeed on the merits of their claim that section 93 of the Act is preempted by the LMRDA. The court had more difficulty with the contentions that the NLRA and ERISA were preemptive, but concluded that because of the discretion vested in the Commission by virtue of the last sentence in section 93(b), in actual application no conflict might arise between that section and those federal statutes.[3] The court was also skeptical of the merits of the Union's contentions that section 86, incorporated by reference in section 93, was unconstitutionally overboard or unduly vague. Summarizing, the court concluded:

> In view of all of these considerations, the court concludes that plaintiffs are not likely to succeed on the merits of their vagueness claim. Nor are they likely to succeed on the merits of their related overbreadth and First Amendment claims. The absence of any irreparable harm *pendente lite* has already been discussed in connection with the discussion of plain-

3. "The commission may for the purpose of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require." N.J.Stat. Ann. 5:12-93(b) (West Supp. 1982).

tiffs' preemption claims, as has the conclusion that the balance of equities and the public interest weigh against the issuance of a preliminary injunction.

536 F.Supp. at 338. An order was entered on March 22, 1982 denying the motion for a preliminary injunction. The plaintiffs appealed. Their application, pursuant to Fed. R. App. P. 8(a) for an injunction pending appeal was initially denied in the district court, and here.

Because no preliminary injunction was entered, the Commission went forward with a disqualification hearing. Its subsequent actions were called to the attention of the district court in a motion, pursuant to Fed. R. Civ. P. 62(c), for reconsideration of the issuance of an injunction pending this appeal. On September 28, 1982 the Commission issued an opinion in which it found that President Frank Gerace, Executive Board member Frank Materio and Business Agent Karlos LaSane were disqualified under the criteria of section 86. Gerace and Materio were held to be disqualified under section 86(f) because they were associated with members of organized crime in a manner inimical to the policy of the Act and to gaming operations. LaSane was disqualified under section 86(c) because he had been convicted in 1973 of extortion from persons doing business with Atlantic City while he was a City Commissioner. The Commission concluded that the Union should be barred from collecting dues from its members employed in the casino industry. The district court ordered that the Commission be enjoined, pending this appeal, from taking any steps to enforce section 93 or its September 28, 1982 decision. That order did not prohibit the Commission from rendering an opinion interpreting section 93(b) with respect to the Union's administration of pension and welfare funds. On October 12, 1982 the Commission issued an opinion holding that the dues collection prohibition and the welfare fund prohibition could be applied singly or

jointly, but that in this instance it would not invoke the latter sanction.[4]

The present status of the case, therefore, is that the district court denied a preliminary injunction against enforcement of section 93 and denied a Rule 8(a) motion for such an injunction pending appeal, but on a Rule 60(b) motion reconsidered the Rule 8(a) motion and granted an injunction pending appeal, which will expire by its terms upon the entry of a judgment disposing of the Union's appeal. Except for that injunction, the Union would now be prohibited from collecting dues from its casino hotel members unless it replaced its President, its Business Agent, and a member of its Executive Board.

II.

The Cross-Appeals

Neither the Commission nor the Division contends that the denial of a Rule 12(b)(6) motion is anything but an interlocutory order. Both contend, however, that they can appeal by virtue of 28 U.S.C. §1292(a)(1). Their theory is that "[a]n appeal from an injunctive order supports review of an order denying a motion to dismiss for failure to state a cause of action, for improper venue, for lack of jurisdiction, and for lack of standing." 9 *Moore's Federal Practice* §110.25, at 271 (2d ed. 1970) (footnotes omitted). There are several difficulties with applying that theory in this case. In the first place, the Commission and the Division are the prevailing parties in the district court. They simply are not aggrieved by the denial of the preliminary injunction. Moreover no order has been entered on the motions to dismiss. The trial court's opinion

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4. The October 12, 1982 order obviously was not called to the district court's attention in connection with the Rule 60(b) motion, but it is a matter of public record which the parties called to our attention and of which we can properly take judicial notice.

discussed these motions, but appeals do not ordinarily lie from opinions. See Fed. R. Civ. P. 54(a), 58. Finally, even if we were to treat the opinion as if it were an order, in this circuit it would not be reviewable in conjunction with an appeal from even the grant of a preliminary injunction. *Kershner v. Mazurkiewicz*, 670 F.2d 440 (3d Cir. 1982). Thus the Union's contention that the cross-appeals should be dismissed must prevail. Neither section 1291 nor section 1292(a)(1) provides for appellate jurisdiction over them, and they must be dismissed.

We can, of course, consider the contention that the district court should have dismissed the complaint on the authority of *Younger v. Harris*, 401 U.S. 37 (1971), or *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), as an alternative ground for affirmance of the denial of preliminary injunctive relief. *See New Jersey Education Association v. Burke*, 579 F.2d 764, 766 (3d Cir.), *cert. denied*, 439 U.S. 894 (1978). Thus no significant prejudice to the state's interests occurs in this instance from its inability to appeal at this time from the trial court's inaction on its motion to dismiss.

III.

New Jersey Regulation of Gambling

Prior to 1844 New Jersey, like many states, was so tolerant of gambling that it regularly authorized lotteries as a means of raising revenues for public or charitable purposes.[5] The Constitution adopted that year, however, included the provision that "[n]o lottery shall be authorized by this state; and no ticket in any lottery not authorized by a law of this state shall be bought or sold within the state. . . ." N.J. Const. of 1844, art. 4, §7, ¶ 2. That provision was amended in 1897 to read:

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5. *See* Justice Bodine's discussion of the early common law in Dombrowski v. State, 111 N.J.L. 546, 168 A. 722 (S. Ct. 1933). Note, *The Casino Act: Gambling's Past and the Casino Act's Future*, 10 Rut.-Cam. L. J. 279 (1979).

> No lottery shall be authorized by the legislature or otherwise within this state, and no ticket in any lottery shall be bought or sold within this state, nor shall pool-selling, book-making or gambling of any kind be authorized or allowed within this state, nor shall any gambling device, practice or game of chance now prohibited by law be legalized, or the remedy, penalty or punishment now provided therefor be in any way diminished.

From 1897 to 1939 the flat prohibition against legalizing any form of gambling was the constitutional public policy of the state. In 1939, however, New Jersey, looking covetously at the potential state revenue which might be derived from pari-mutuel betting, amended art. 4, §7, ¶2 so as to make it lawful "to hold, carry on, and operate in this State race meetings whereat the trotting, running or steeplechase racing of horses only may be conducted between the hours of sunrise and sunset on week days only and in duly legalized race tracks, at which the pari-mutuel system of betting shall be permitted." 1939 N.J. Laws at 1063. The 1939 amendment put the state in the position of having an interest in gambling revenues for the first time since prior to 1844.

When the Constitution of 1947 was adopted it included the general provision that "[n]o gambling of any kind shall be authorized by the Legislature unless the specific kind, restrictions and control thereof have been heretofore submitted to, and authorized by a majority of the votes cast by the people at a special election or shall hereafter be submitted to, and authorized by a majority of the votes cast thereon by the legally qualified voters of the State voting at a general election. . . ." N.J. Const. of 1947, art. 4, §7, ¶2. An exception authorized bona fide veterans, charitable, educational, religious or fraternal organizations, civic or service clubs, volunteer fire companies and first-aid or rescue squads to conduct bingo or lotto games and to hold raffles. Thus the pre-1844 prac-

tice of supporting worthwhile social activities by gambling revenue was substantially restored. In 1969 art. 4, §7, ¶2 was amended to authorize the conduct of State lotteries "when the entire net proceeds of any such lottery shall be for State institutions, [sic] State aid for education." For the statutory enactments pursuant to this authorization, see N.J.Stat. Ann. 5:9-1 to -25 (West 1973). Other forms of gambling still required approval in a statewide referendum. The voters were generally unreceptive.

In 1976, however, the Constitution was amended once more, permitting the Legislature to authorize by law the establishment of gambling houses or casinos in the City of Atlantic City, so long as the authorizing legislation "shall provide [that] the State revenues derived therefrom . . . be applied solely for the purpose of providing reductions in property taxes, rentals, telephone, gas, electric, and municipal utilities charges of, eligible senior citizens and disabled residents, in accordance with such formulae as the Legislature may by law provide." N.J. Const. of 1947, art. 4, §7, ¶2.D. Pursuant to that authorization the Legislature adopted the statute containing sections 93 and 86.

Unlike the State Lottery Law, N.J. Stat. Ann. 5:9-1 to -25 (West 1973 & Supp. 1982), under which the Department of the Treasury is directly in the lottery business, the Casino Control Act authorizes erection of casinos by private investors. The State, however, has a direct financial stake in their operation, since it imposes an annual tax of 8% of gross revenues. N.J. Stat. Ann. 5:12-144 (West Supp. 1982). Moreover the statute regulates the hours of casino operation, N.J. Stat. Ann. 5:12-97(a) (West Supp. 1982), and contains detailed provisions encouraging reinvestment of casino profits in the expansion of the industry. N.J. Stat. Ann. 5:12-146, -147 (West Supp. 1982) Regulation of the industry is financed by license and registration fees. N.J. Stat. Ann. 5:12-139 to -143 (West Supp. 1982) Since the casino ho-

tels are privately owned and managed, the State obviously does not claim that they are exempt under section 2(2) of the NLRA, 29 U.S.C. §152(2) (1976). Nevertheless the state's interests and those of the employers here involved are closely aligned economically.

IV.
Federal Regulation of Collective Bargaining

Under the regime of *Adair v. United States*, 208 U.S. 161 (1908), state law interference with efforts of employees to choose their own collective bargaining representatives was largely beyond the reach of congressional enactments, and state law regularly interfered. New Jersey was no exception. *See, e.g., Kinane v. Fay*, 111 N.J.L. 553, 168 A. 724 (S.Ct. 1933); *Brennan v. United Hatters of North America*, 73 N.J.L. 729, 65 A. 165 (S.Ct. 1906) and cases cited therein. In 1930, however, the Supreme Court in *Texas & New Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548 (1930), effectively overruled *Adair* when it held that the Railway Labor Act of 1926 was constitutional.[6] Not long thereafter Congress began the modern era of the law of labor relations when in section 7(a) of the National Industrial Recovery Act (NIRA) it provided:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or

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6. Robert L. Hale, Professor of Law, Columbia University, in hearings on the NLRA explained that although *Adair* was not explicitly overruled by *Texas & New Orleans Railroad Co.*, that was the practical effect of the decision. *To Create a National Labor Board, Hearings on S. 2926 Before The Senate Committee on Education and Labor*, 73d Cong., 2d Sess. 52 (1934) (statement of Robert L. Hale, Professor of Law, Columbia University).

> their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Pub. L. No. 73-67, §7(a), 48 Stat. 198 (1933). Borrowed from a similar provision in the Railway Labor Act, section 7(a) was intended to establish a federal law right to choose collective bargaining representatives. The NIRA, however, contained no effective enforcement mechanism, and experience under it led to the adoption, in 1935, of the NLRA. In that statute Congress carried forward the federal policy announced in the NIRA. It "declared to be the policy of the United States to eliminate . . . obstructions to the free flow of commerce . . . by protecting the exercise by workers of full freedom of association, selforganization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. §151 (1976). The first clause of section 7(a) of the NIRA was substantially copied in section 7 of the NLRA:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

49 Stat. 449, 452 (1947); 29 U.S.C. §157 (1976). But whereas the clause in section 7(a) of the NIRA dealing with coercion of employees in the choice of collective bargaining representatives was largely precatory, section 8 of the NLRA made all forms of such coercion unfair labor practices. 49 Stat. 449, 453 (1947); 29 U.S.C. §§159, 160 (1976). Moreover the NLRA created the National Labor Relations Board, gave it authority in section 9 to certify designated collective bargaining representa-

tives, and power in section 10 to prevent unfair labor practices. 49 Stat. 449, 453 (1947); 29 U.S.C. §§159, 160 (1976). Thus ever since the enactment of the NLRA employee self-organization and employee free choice has been a federal statutory right, the interference with which is an unfair labor practice which the National Labor Relations Board has power to prevent. Moreover, as originally enacted the Board's section 10 enforcement power was "exclusive, and . . . not affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." 49 Stat. 449, 453 (1947).

When the NLRA was under consideration opponents of the legislation called to the attention of Congress the issue of labor racketeering.[7] Thus Congress was not unmindful of the generic problem which section 93 of the Casino Control Act now addresses in a specific industry. Despite these rather forceful expressions from opponents of the NLRA, however, the 74th Congress placed no limitations in section 7 or section 8 upon the persons who could be chosen as collective bargaining representatives. Considering the extent to which the criminal law had been used, prior to 1935, against labor organizers, a history of which no member of Congress could have been ignorant, the omission of "racketeering" limitations on qualifications for designation as a collective bargaining representative plainly was a conscious legislative choice both in the 1933 NIRA and in the 1935 NLRA.

Before Congress next turned major attention to the subject of collective bargaining the Supreme Court was

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7. *Hearings on S. 2926 Before the Senate Committee on Education and Labor*, 73d Cong., 2d Sess. 606-07, 645-46, 745-52, 979 (1934) (statements of William B. Donham, Dean, Harvard Business College; Howard Goodman, Manager, Goodman Manufacturing Co.; Charles R. Hook, Pres., American Rolling Mill, Co.; William F. Dunne, Member, National Committee of the Trade Union Unity League).

presented with the question of whether state law could determine ineligibility of collective bargaining representatives. In 1943 Florida passed a statute providing for the licensing of union business agents and prohibiting the licensing of persons who were not citizens for more than 10 years, who had been convicted of a felony, or who were not of good moral character. 1943 Fla. Laws C. 21968. The Florida statute was enacted after the Supreme Court held in *Allen-Bradley Local v. Wisconsin Board*, 315 U.S. 740 (1942), that section 7 of the NLRA did not preempt state prohibition of mass picketing, threats of personal injury, or property damage. When an employer refused to bargain with an unlicensed business agent, the Board held that it committed an unfair labor practice. *In the Matter of Eppinger & Russel Co.*, 56 NLRB 1259 (1944). Meanwhile in a state court the Attorney General of Florida sought injunctive relief against a union and a business agent functioning as such until licenses were obtained. The highest court of Florida enforced the statute. *Hill v. State*, 155 Fla. 254, 19 So. 2d 857 (1944). On the authority of its classic statement in *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), with respect to the preemptive effect of federal legislation, the Supreme Court reversed, holding:

> Since the Labor Board has held that an employer must bargain with a properly selected union agent despite his failure to secure a Florida license, it is argued that the state law does not interfere with the collective bargaining process. But here, this agent has been enjoined, and if the Florida law is valid he could be found guilty of contempt for doing what the act of Congress permits him to do. Furthermore, he could, under §14 of the state law be convicted of a misdemeanor and subjected to fine and imprisonment. The collective bargaining which Congress has authorized contemplates two parties free to bargain, and cannot thus be frustrated by state legisla-

> tion. We hold that §4 of the Florida Act is repugnant to the National Labor Relations Act.

Hill v. Florida, 325 U.S. 538, 542 (1945). The Court also held that, consistent with the NLRA, the Union could not be enjoined from functioning as a collective bargaining representative for failing to obtain a state license and file an annual information return. 325 U.S. at 543. Chief Justice Stone concurring did not agree that the states could not require that labor unions or their agents to obtain licenses or file reports. "But," he observed, "it is quite another matter to say that a state may fix standards or qualifications for labor unions and their officers and agent which would preclude them from being chosen and from functioning as bargaining agents under §7 of the National Labor Relations Act." 325 U.S. at 545. That is precisely what New Jersey has done in section 93. Thus the *Hill* Court's holding on the preclusive effect of section 7 is controlling unless it has been modified by subsequent federal legislation or overruled by the Supreme Court.

Congress had not yet reentered the field when the Court had a further opportunity to consider its position that the NLRA preempted state law respecting bargaining representatives. The occasion arose because of the Board's discretionary rulings, prior to the decision in *Packard Co. v. Labor Board*, 330 U.S. 485 (1947), that although foremen were covered by section 7 they were not, generally speaking, an appropriate bargaining unit. In *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767 (1947), the Court on the authority of *Hill v. Florida* held that a state labor board could not exercise jurisdiction to consider whether foremen bargaining units would be recognized. Justice Jackson reasoned:

> If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the dis-

> cretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict."

330 U.S. at 776. Just such a mischievous conflict occurs in the instant case, since the Board has certified the Union while the Commission's proposed order will render the union ineffective as a bargaining agent unless it dismisses three key officers. The Board has consistently asserted jurisdiction over the casino industry. *El Dorado Club*, 151 N.L.R.B. 579 (1965) (Nevada's extensive regulation of gambling industry and concern over criminal infiltration are not reasons for declining jurisdiction under section 14(c)(1) of the NLRA).

In 1947, the *Hill* and *Bethlehem Steel* cases were the Court's definitive interpretations of the preemptive effect of sections 7 and 8. Thus, when Congress undertook a major revision of the NLRA, it was presented with an occasion to reconsider these holdings. In the Labor Management Relations Act (LMRA), enacted that year, both section 7 and section 8 were amended. In the former, as amended, Congress carried forward the language from the NIRA and the NLRA establishing federal rights of employees to form unions and to bargain collectively through representatives of their own choosing, but added a correlative "right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as recognized in section 8(a)(3)." Labor Management Relations Act of 1947, Pub. L. No. 101, ch. 120, §7, 61 Stat. 136 (1947). Section 8 was amended by the addition of a subsection dealing with unfair labor practices by unions, and the Board was given jurisdiction over these. Section 10 of the NLRA was amended by the elimination of the exclusive jurisdiction provision, and instead the Act provided that:

> [The Board's] power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

29 U.S.C. §160(a) (1976). Congress also addressed the union racketeering issue, by making it unlawful for employers to pay or labor representatives to receive money or other things of value. That prohibition was made enforceable by federal criminal and civil provisions. Pub. L. No. 101, ch. 120, §302, 61 Stat. 136 (1947); 29 U.S.C. §186 (1976). Moreover, certain boycotts and other unlawful combinations were proscribed. Pub. L. No. 101, ch. 120, §303, 61 Stat. 136 (1947); 29 U.S.C. §§186-187 (1976).

The effect of the 1947 legislation was to confirm substantially the Court's interpretation of the preemptive effect of sections 7 and 8. The amendment to section 10, permitting the Board to cede jurisdiction in certain cases to state agencies, addressed the so-called no-man's land problem of NLRB declination of jurisdiction and state agency lack thereof which the *Bethlehem Steel* case created. Such deferral to state agencies could occur, however, only if the state agency was prepared to apply the standards of federal law. But while dealing explicitly with labor racketeering issues in sections 302 and 303 of the LMRA, and while amending section 7, Congress

made no change in the federal law respecting eligibility to act as a bargaining representative. The reenactment of the original section 7 as the first clause in the amended section 7 must be considered to be a Congressional approval of the holding in *Hill* that state law on eligibility is preempted. *Merrill, Lynch, Pierce, Fenner, & Smith v. Curran,* U.S. , 102 S.Ct. 1825 (1982).

When presented with the question, the Court held that "the [1947] proviso to §10(a) is the exclusive means whereby States may be enabled to act concerning the matters which Congress has entrusted to the National Labor Relations Board." *Guss v. Utah Labor Board,* 353 U.S. 1, 9 (1953). The Court had in the interim decided in *Automobile Workers v. O'Brien,* 339 U.S. 454 (1950), that the strike-vote provisions of the Michigan Labor Mediation Law were preempted by section 7, and in *Amalgamated Assn. of Street, Electric Railway & Motor Coach Employees of America, Division 998 v. Wisconsin Employment Relations Board,* 340 U.S. 383 (1951), that section 7 preempted the Wisconsin Public Utility Anti-Strike Law. The *Guss* Court, in support of its holding that the deferral proviso in section 10(a) is the exclusive means whereby state law can be permitted to operate, quoted approvingly this observation in *Amalgamated:*

> The legislative history of the 1947 Act refers to the decision of this Court in *Bethlehem Steel Co. v. New York Labor Board,* 330 U.S. 767 (1947), and, in its handling of the problems presented by that case, Congress demonstrated that it knew how to cede jurisdiction to the states. Congress knew full well that its labor legislation 'preempts the field that the act covers insofar as commerce within the meaning of the act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative.

353 U.S. at 9 (quoting 340 U.S. at 397-98). Five years after the *Guss* decision, in holding that a state court could not set aside a collective bargaining agreement violative of an Ohio antitrust law, the Court reiterated the authority of *Hill v. Florida, Automobile Workers v. O'Brien*, and *Amalgamated Association v. Wisconsin Employment Relations Board. See Local 24, International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283, 296 (1959). Thus as the federal law stood after the enactment of the LMRA there could be no room for avoiding, in a case such as this, the binding authority of the *Hill* decision.

The same year that the Court reiterated the *Hill* preemption rule in *Teamsters Union v. Oliver* Congress turned its attention once again to the collective bargaining relationship. In the Labor Management Reporting and Disclosure Act (LMRDA) it dealt even more explicitly than in section 302 of the LMRA with the problems of corruption within union leadership and of undemocratic conduct of internal union affairs. Pub. L. No. 86-257, 73 Stat. 519 (1959). The 1959 Act imposed elaborate reporting requirements and enacted a "bill of rights" for members. Title VII of the LMRDA amended the LMRA in certain respects, none of which are here relevant. Section 603(b) provides that nothing in the first six titles should be construed "to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended." Pub. L. No. 86-257, §603(b), 73 Stat. 519 (1959); 29 U.S.C. §523(b) (1976). The LMRDA also established a number of criminal sanctions. *See, e.g.*, 29 U.S.C. §§501, 502, 503-522 (1976). Because many of the proscribed activities were already crimes under state law and not protected activities under section 7 of the NLRA as amended, Congress decreed in section 604 of the LMRDA that it would not "impair or diminish the authority of any State to enact and enforce general criminal laws with respect to robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of

narcotics laws, murder, rape, assault with intent to kill, or assault which inflicts grievous bodily injury, or conspiracy to commit any such crimes." 29 U.S.C. §524 (1976). This provision was included in recognition of the holdings in *Garner v. Teamsters Union*, 346 U.S. 485 (1953), and *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), that in the field of labor law preemption might apply not only with respect to activity protected by section 7, but also with respect to activity prohibited by a federal regulatory scheme. Those cases also influenced Congress to include in section 603(a) of the LMRDA a savings clause preserving state law remedies for breach of fiduciary duties. 29 U.S.C. §523(a) (1976). Finally, and of most immediate significance, Congress in section 504 of the LMRDA enacted for the first time a provision dealing explicitly with disqualifications for holding union office.[8] But while section 603(a) preserves state law remedies for breach of fiduciary duties, and section 604 preserves the states' traditional authority to enact garden variety criminal laws, there is no equivalent savings provision in section 504.

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8. §504. Prohibition against certain persons holding office

(a) Membership in Communist Party; persons convicted of robbery, bribery, etc.

No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve —

(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, or

Thus in 1959 Congress, fully aware of the holding in *Hill v. Florida* that section 7 preempted state disqualification laws, of the rule of statutory interpretation applied in *Amalgamated Association of Employers v. Wisconsin Employment Relations Board* and *Guss v. Utah Labor Board* that Congressional deference to state law must be specific, and of the holdings in *Garner v. Teamsters Union*, 346 U.S. 485 (1953), and *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), that even state regulation of activity prohibited by federal law is preempted, chose to legislate on the subject of

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NOTE — *(Continued)*

(2) as a labor relations consultant to a person engaged in an industry or activity affecting commerce, or as an officer, director, agent or employee (other than as an employee performing exclusively clerical or custodial duties) of any group or association of employers dealing with any labor organization,

during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the Board of Parole of the United States Department of Justice determines that such person's service in any capacity referred to in clause (a) or (2) would not be contrary to the purposes of this chapter. Prior to making any such determination the Board shall hold an administrative hearing and shall give notice of such proceeding by certified mail to the State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The Board's determination in any such proceeding shall be final. No labor organization or officer thereof shall knowingly permit any person to assume or hold any office or paid position in violation of this subsection.

(b) Penalty for violations

Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

29 U.S.C. §504 (1976).

union officer disqualification with no deference to state authority, either with respect to parallel disqualification criteria or with respect to conflicting disqualification criteria. Since both disqualification and preemption were carefully considered in the same legislation no intention can be attributed to Congress other than preservation of the *Hill v. Florida* rule. Indeed the Senate Report on the LMRDA is explicit in this respect. "Section 305(a) is designed to further protect union members' and the public interest by establishing certain standards for persons holding union office — *a matter within the purview of the Federal Government*." S. Rep. No. 187, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2366 (emphasis supplied). Although the Commission and the Division urge otherwise, nothing in the LMRDA casts any doubt upon the continued authority of the *Hill v. Florida* interpretion of section 7 of the NLRA.

We note at this point that there are in labor law two separate preemption doctrines. The first, covering protected activity, is absolute.

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

San Diego Building Trades Council v. Garmon, 359 U.S. at 244. On the other hand, where the activity in question is not specifically protected by section 7 but is nevertheless federally regulated, a case by case determination of the interaction between state and federal regulatory schemes is required. *E.g., Farmer v. Carpenters*, 430

U.S. 290, 296 (1977); *Motor Coach Employers v. Lockridge*, 403 U.S. 274, 279-98 (1971); *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 59-60 (1966). The *Hill v. Florida* rule, and this case, fall in the first category. Choice of a bargaining representative is totally protected by section 7, except to the extent that the bargaining representative may be disqualified under section 503(a) of the LMRDA. No section 504 LMRDA disqualification applies to this Union's officers.[9] Thus there is neither occasion nor justification for engaging in weighing or balancing. State disqualification statutes which go beyond section 504 simply cannot operate in interstate commerce to disqualify otherwise eligible bargaining representatives.

The Commission and the Division place their chief reliance on one post-LMRDA case, *DeVeau v. Braisted*, 363 U.S. 144 (1960), which they contend overruled *Hill v. Florida*. *DeVeau* involved a challenge on preemption grounds to the constitutionality of section 8 of the New York Waterfront Commission Act of 1953, which disqualified from office in any waterfront labor organization convicted felons who had not been pardoned. The New York legislation and companion legislation in New Jersey were adopted pursuant to an interstate compact between those states. The compact was submitted to Congress, as required by article I, section 10 of the Constitution, and after hearings in both the House and Senate was approved. Nevertheless a disqualified union officer contended that the state statute was preempted by sections 1 and 7 of the NLRA. Justice Frankfurter rejected that contention, observing:

> In light of the purpose, scope and background of this New York legislation and Congress' relation to

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9. LaSane's extortion conviction would be disqualifying under 29 U.S.C. §504(a) had it occurred within five years. His 1973 conviction falls well outside the time fixed in the federal law.

> it, such an inference of incompatibility has no foundation. In this case we need not imaginatively summon the likely reaction of Congress to the state legislation, as a basis for ascertaining whether due regard for congressional purpose bars the state regulation. Here the States presented their legislative program to cope with an urgent local problem to the Congress, and the Congress unambiguously supported what is the core of this reform. Had §8 [of the New York law] been written into the compact, even the most subtle casuistry could not conjure up a claim of pre-emption.

363 U.S. at 153. He also rejected the contention that the enactment of the LMRDA, subsequent to Congressional approval of the compact, vitiated prior approval. Frankfurter's opinion did not command a majority, but even in speaking for himself and the three justices who joined in it he was careful not to intimate that *Hill v. Florida* was overruled. The absence of any such suggestion is significant, since Frankfurter had dissented in *Hill v. Florida*. 325 U.S. at 547. Obviously he was unable in *DeVeau* to find support for the adoption of his dissenting position. Justice Brennan, whose separate brief opinion was critical for the judgment, made it clear that he relied on Congressional intent in approving the compact. 363 U.S. at 162. The dissenting justices, who noted that the justices in the majority were not overruling *Hill v. Florida*, disagreed only about the proper construction of the compact. 363 U.S. at 161, 163 (Douglas, J., dissenting). The *DeVeau* case cannot, therefore, be read as impairing the authority of *Hill v. Florida*.

The Commission and the Division also urge that *Hill v. Florida* is distinguishable because the Florida statute there involved was of a general nature, while section 93 is restricted to the casino industry, which is a matter of particular state concern. For several reasons we must reject that effort to avoid the precedential effect

of *Hill v. Florida*. In the first place sections 86 and 93 are not even restricted to casino employees. They cover casino hotel employees, who by definition do *not* work in the casinos. It is too late to suggest that places of public accommodation are not engaged in interstate commerce *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). Moreover, even if the state legislation were restricted to employees employed directly in the casinos we would find the argument based on the state's deep interest in that business unpersuasive. Essentially the same argument was rejected when as a reason for avoiding federal preemption, states asserted their deep interest in the operation of state franchised public utilities. *Amalgamated Association of Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1950). Congress has given the states the option, with respect to areas in which they have a deep interest, of relegating activities in those areas to political subdivisions. 29 U.S.C. §152(2) (1976); *NLRB v. Natural Gas Utility District*, 402 U.S. 600 (1971). Indeed New Jersey has exercised that option with respect to its lottery. N.J. Stat. Ann. 5:9-4 (West 1973). Congress has not, however, given the states the further option of deciding for themselves which areas of private enterprise can be so cloaked with the mantle of state interest as to be placed outside the preemptive scope of section 7 of the NLRA. The state argues that it should have that option at least for the gambling industry, because that industry is uniquely attractive to unwholesome elements in our society. Recognition of such a doctrine, however, could not be confined to the gambling industry. Other industries in which the state is vitally interested have also been identified as susceptible of infiltration by organized crime.[10] The problem of organized crime is a national one, which Congress has addressed both in criminal

10. The New Jersey solid waste industry has frequently been so identified.

statutes, *e.g.*, 18 U.S.C. §§1961-1968 (1976 & Supp. IV 1980), and by permitting general state criminal law to operate against labor union officials. 29 U.S.C. §524 (1976). That problem cannot be relied upon by the states to Balkanize the law with respect to choice of collective bargaining representatives in non-exempt interstate commerce.

We conclude, therefore, that none of the arguments advanced by the Commission and the Division can avoid the controlling law announced in *Hill v. Florida*. Section 93 of the Casino Control Act is preempted by section 7 of the NLRA insofar as it purports to confer on the Commission authority to disqualify as bargaining representatives the duly elected or selected officials of a union certified by the Board as exclusive bargaining agent. Thus the trial court's doubts about the Union's ultimate success on the merits, insofar as they were based on doubts about the preemptive effect of section 7, were groundless.

V.

Federal Regulation of Pension Funds

Following the enactment in 1959 of the LMRDA the next relevant Congressional legislation in the field of employer-employee relations was the enactment, in 1974 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001-1381 (1976). ERISA embodies a comprehensive legislative scheme which spells out in great detail the respective roles of the states and the federal government with respect to employee benefit plans. *See* 29 U.S.C. §1001 (Congressional findings and declaration of policy). Section 514(a) of ERISA provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to

> any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. §1144. The two plans of which Mr. Gerace is a trustee are employee benefit plans falling within the coverage of ERISA, and thus within section 514. Under the statute "[t]he term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. §1144(c)(1). "The term 'State' includes . . . any agency . . . which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." 29 U.S.C. §1144(c)(2). We have previously discussed the legislative history of ERISA's comprehensive preemption section, finding that it "make[s] plain that the preemptive intent is just as broad as its language suggests." *Buczynski v. General Motors Corp.*, 616 F.2d 1238, 1250 (3d Cir. 1980), *aff'd sub nom Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

Despite section 514 the Commission and the Division contend that section 93(b) does not "relate to any employee benefit plan." That contention is belied by the plain language of the New Jersey statute:

> No labor organization . . . may administer any pension or welfare funds, if any officer . . . is disqualified in accordance with the criteria contained in section 86 of [the] act.

N.J. Stat. Ann. 5:12-93(b). These words cannot seriously be said not to "relate to any employee benefit plan." 29 U.S.C. §1144(a). ERISA states that statutes relating to employee benefit plans are preempted even when their effect is indirect. 29 U.S.C. §1144(c)(2). These preemption subsections have been definitively construed by the Supreme Court. "ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the preemption provision." *Alessi v.*

Raybestos-Manhattan, Inc., 451 U.S. 504, 525 (1981). In light of that construction the contention that section 93 and ERISA may lawfully coexist is fanciful.

VI

Propriety of Injunctive Relief

Since in Parts IV and V of this opinion we conclude that the Union's claims that section 93 is preempted by section 7 of the NLRA and section 514 of ERISA are meritorious, we turn to the question whether the requested preliminary injunctive relief against the proceeding pending before the Commission should have been granted. Federal law standards for such relief are clear. They include the likelihood of the moving party succeeding on the merits at final hearing, the likelihood of irreparable harm to the moving party *pendente lite* if no relief is granted, the possibility of harm to other interested parties from the grant of such relief, and the public interest. *E.g., Constructors Association v. Kreps*, 573 F.2d 811, 815 (3d Cir. 1978); *Oburn v. Shapp*, 521 F.2d 142, 147 (3d Cir. 1975).

Our discussion in Parts IV and V is dispositive of the first factor. Since section 93 cannot coexist with section 7 of the NLRA and section 514 of ERISA, the district court should have recognized that sooner or later the Union's objection to the Division's efforts to deprive it of dues revenues and make it ineligible to maintain pension and welfare funds must prevail.

Moreover the application of the second factor, irreparable harm *pendente lite*, seems plain. Irreparable harm *pendente lite* includes at least that kind of harm which cannot be rectified after final hearing by an award of money damages. Clearly that was threatened when the Division moved before the Commission for an order disqualifying the Union from collecting dues from its 8000 plus members employed by casino hotels. Had the order gone into effect, the Union would either have been

deprived of the financial wherewithall to carry on its collective bargaining responsibilities or have deposed those duly elected officers whom the membership selected as their collective bargaining representatives. In neither case would it be possible, long after the event, to measure in money and compensate for the harm to the ongoing collective bargaining relationship from intangibles such as erosion of members' confidence in their chosen collective bargaining organization, delay in the process of grievances, or disruption of internal union affairs. The Division, while pressing forward with its effort to obtain disqualification, makes the disingenuous argument that "[a]t the conclusion of the hearing, the Commission could find the Union totally qualified, in which case the present proceeding might arguably become moot." Brief for Appellees/Cross Appellants (Division) at 48. In fact, however, in the absence of a preliminary injunction the Division pressed forward, diverting the Union's efforts to the defense of that illegal proceeding rather than the performance of its normal functions as the certified bargaining representative of its members.

Nor can the Division or the Commission point to any irreparable harm to them or to the casino industry from an injunction pending a judicial resolution of the contention that section 93 cannot be applied to the Union. Both point to the necessity for maintaining integrity in the casino industry, but there are ample means available to that end short of disqualifying duly certified bargaining representatives. No showing was made in the district court that the potential infiltration of the casino industry by criminal elements operating through the Union would become an actuality before final hearing.

Finally there is the matter of the public interest. Obviously the first place to look for that interest is the governing law, which in this case is federal. The extent of the national public interest in preventing state agencies from purporting to exercise a jurisdiction which is the

exclusive preserve of the Board may be judged by cases recognizing that the Board can obtain injunctive relief against the exercise of such jurisdiction by state courts both before and after the General Counsel has filed a Board charge. *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971); *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954).[11] Moreover even if a state court were to attempt to enforce an order in a preempted labor area the national public interest in preserving federal preemption is so strong that the order could be disobeyed without fear of being held in contempt. *In re Greene*, 369 U.S. 689 (1962).

Against the clear national public interest in preventing erosion of the exclusive role of section 7 in determining collective bargaining representatives the Commission and the Division is arrayed the artillery of *Younger v. Harris*, 401 U.S. 37 (1971), *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The district court was unpersuaded by these big guns, and so are we.

Pullman abstention would at most have required that the district court retain jurisdiction while a narrowing construction of section 93 which might avoid the constitutional adjudication was sought from a New Jersey tribunal. Before the complaint was filed the Commission had already ruled that it could not consider the Union's preemption claim. Moreover the defendants never suggested any construction of section 93 which could avoid deciding the preemption issue. The Union was certified by the Board with the present officers. Section 93 says that it may be disqualified if the Commission decides some of them fall within the criteria in section 86. *Pullman* abstention would be an exercise in

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11. *Cf.* Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511 (1955) (28 U.S.C. §2283 prevents injunction against state court proceeding in action by Union rather than Board).

futility. Moreover, even if the district court had decided to abstain pending the Commission's interpretation of section 93 it would still have been obliged to consider the grant of preliminary injunctive relief from harm *pendente lite*. *New Jersey-Philadelphia Presbytery v. New Jersey State Board of Higher Education*, 654 F.2d 868, 886 (3d Cir. 1981).

Burford v. Sun Oil Co. has no application. As the district court noted, the questions of state law presented by sections 93 and 86 are neither technical nor complex. 536 F.Supp. at 325. Moreover no argument can be entertained based on disruption of a state administrative scheme in a case in which the court is asked to decide whether the very existence of that scheme violates a paramount federal statute. *A fortiori* that is so when, as here, the state agency lacks authority even to entertain the preemption challenge.

As to the *Younger v. Harris* line of cases, we reiterate the point made in *New Jersey-Philadelphia Presbytery v. New Jersey State Board of Higher Education*, that, absent federal district court intervention, state agency orders which operate as prior restraints upon the exercise of federally protected rights may by virtue of the final judgment rule in 28 U.S.C. §1257 (1976), escape any federal appellate review for long periods. 654 F.2d at 884. Moreover, the federal policy of preventing state courts from eroding rights guaranteed by section 7 is so important that as a matter of federal law a state court is without power to hold one in contempt for violating an order it had no power to enter. *In re Greene*, 369 U.S. 689 (1962). *See also Amalgamated Association v. Wisconsin Employment Relations Board*, 340 U.S. 383, 386, 399 (1951). Even pending state proceedings may be enjoined on preemption grounds. *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971); *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954). These authorities suggest that when the issue tendered to a federal district court is the very

power, as a matter of federal law, to entertain a threatened proceeding, the principles of comity and federalism which apparently animate the *Younger v. Harris* rule are totally inapplicable. Certainly we cannot hold that the district court committed an abuse of discretion in holding a hearing on the Union's motion for a preliminary injunction.

Given that the Union's contentions based on section 7 of the NLRB and section 514 of the LMRDA are meritorious, that there was a strong likelihood of harm *pendente lite* to its status as a collective bargaining representative, that no commensurate harm to the defendants would have resulted from the grant of *pendente lite* relief, and that a strong national public interest exists in preventing the unlawful exercise of state agency jurisdiction in a preempted area, we hold that the trial court should have granted a preliminary injunction pending final hearing against the enforcement of section 93(b) in any manner inconsistent with 29 U.S.C. §504.

VII

Overbreadth and Vagueness

Because the statutory supremacy issues which we have discussed in Parts III and IV suffice to dispose of this appeal, we have no occasion to pass upon the Union's overbreadth and vagueness contentions. *Hagans v. Lavine*, 415 U.S. 528 (1974).

VIII

Conclusion

The order appealed from in No. 82-5210 will be reversed and the case remanded to the district court for the entry of an order enjoining the Commission and the Division from taking any action, pending final hearing, to enforce section 93 against the Union. The cross appeals, Nos. 82-5234 and 82-5260, will be dismissed for lack of jurisdiction.

BECKER, J., concurring in part and dissenting in part.

I concur in that part of the majority's opinion which holds that ERISA precludes the Casino Control Commission from regulating the management of pension and welfare funds.[1] And, though I do not agree with the

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1. By reaching the merits of this appeal, the majority assumes that we are presented with a live controversy. I have evinced my agreement with that conclusion by joining the majority's holding that ERISA preempts some of the Casino Control Act's sanctions. I nonetheless find the question sufficiently troublesome that it warrants some discussion.

This is an appeal from a district court order denying appellants' motion for a preliminary injunction. Unlike the complaint, however, the focus of that motion was the holding of hearings that have now taken place: the motion principally alleged that the "*proceedings* [i.e., the Casino Control Commission's hearings and investigations] present an immediate and irreparable injury" to appellants' section 7 rights. Motion for Preliminary Injunction ¶5 (emphasis added). The district court denied the motion on the basis that appellants could not demonstrate that the *proceedings* would result in the requisite irreparable harm: "The inquiry into the qualifications of the union and its leaders may not be considered to visit irreparable harm on the plaintiffs; something further must befall them before preemption may be found." Hotel and Restaurant Employees and Bartenders Int'l Union Local 54 v. Danzinger [sic], 536 F. Supp. 317, 330 (D.N.J. 1982). As the supplemental record now reveals, and as the majority now acknowledges, the proceedings that the district court refused to enjoin have been completed. It thus might appear that this appeal should be dismissed as moot.

Such a disposition, however, would be severe, as all that stands between appellants and enforcement of the Commission's order that Local 54 rid itself of certain officers or be barred from collecting dues from its members is the district court's stay of that order pending the disposition of this appeal. Although I do not think that this unfortunate circumstance is itself sufficient to resurrect what otherwise would be a moot appeal, I do believe that the same considerations which persuaded the district court to grant the stay also suggest that this case is one of a rare breed in which it is appropriate for us to reach the merits, notwithstanding the interlocutory posture of the appeal. As Judge Friendly wrote for the Court of Appeals for the Second Circuit in a similar context:

[A]n appellate court has the power, on review of a denial of a

majority's conclusion that we lack jurisdiction over the cross-appeals,[2] I nevertheless share the majority's view

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temporary injunction, to consider the case on the merits and decide whether the complaint states a claim on which relief can be granted. . . . Although in most of the cases where this course has been followed the appellate court has ordered the complaint to be dismissed, such a procedure is also appropriate in the converse situation at least where, as here, no material facts are contested, the lower court has considered the merits in detail and these have also been argued here. . . . To "save the parties from further litigation" we should therefore "proceed to consider and decide the case upon its merits," [Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 494 (1900)], unless a ruling on the entire complaint, with its requests for declaratory and permanent injunctive . . . relief, has also become moot.

Montano v. Lefkowitz, 575 F.2d 378, 382 (2d Cir. 1978) (citations omitted). This case, too, is amenable to such treatment, despite the fact that the district court did not reach the viability of the Casino Control Act's ultimate sanctions. There are no disputed issues of material fact; the parties have extensively and comprehensively briefed and argued the merits both before the district court and this Court; and the preemption issue, essentially a question of law, is one as to which we ultimately would have plenary review. Because appellants' requests for permanent injunctive and declaratory relief are still very much alive, I therefore agree with the majority's decision to reach the merits of this appeal.

2. Despite its acknowledgment that Kershner v. Mazurkiewicz, 670 F.2d 440 (3d Cir. 1982) (in banc), recognizes a limited class of pendent appeals under 28 U.S.C. §1292(a)(1) (1976), the majority posits three reasons why we do not have jurisdiction over the cross-appeals. None of these considerations, however, poses an insurmountable obstacle to our taking jurisdiction.

First, the majority offers no support for its assertion that the Casino Control Commission and the Division of Gaming Enforcement may not raise their cross-appeals here because they were not aggrieved by the denial of the preliminary injunction. Moreover, that proposition is inconsistent with the fact that courts of appeals reviewing denials of preliminary relief frequently dismiss cases for failure to state a cause of action, thereby acting as if they had granted a cross-motion to dismiss. *See* Montano v. Lefkowitz, 575 F.2d 378, 382 (2d Cir. 1978) (quoted *supra* note 1).

that the district court was correct in declining to abstain.[3]

I cannot subscribe, however, either to the sweeping preemptive scope that the majority ascribes to the NLRA

NOTE — *(Continued)*

Second, the majority is too willing to dismiss the cross-appeals on the ground that the district court (apparently inadvertently) neglected to enter an order denying the motions to dismiss or abstain. The majority states: "The trial court's opinion discussed these motions, but appeals do not *ordinarily* lie from opinions." Majority op., typescript at 16 (emphasis added). But this formulation, by its own terms, admits of an exception, and it is one that we previously have recognized. Where, as here, a district court opinion necessarily and definitively resolves a question as a predicate for its holding, the district court's resolution is reviewable on appeal. *See* United States ex rel. Fielding v. Degnan, 587 F.2d 619, 621 (3d Cir. 1978). Here the district court could not have reached the merits of appellants' motion for preliminary relief without first having denied appellees' motion to abstain.

Finally, the majority incorrectly asserts that a crossappeal from a denial of a motion to abstain does not satisfy Kershner v. Mazurkiewicz's test for pendent interlocutory cross-appeals. *Kershner*, which did not permit the cross-appeal of a class certification order, stated that the issue on cross-appeal must be "inextricably bound" with or controlling of the disposition of the preliminary injunction issue. 670 F.2d at 449. Since injunctive relief should not be granted if abstention is required, it seems quite clear that the propriety of abstention is inextricably bound with the review of a decision to grant or to deny preliminary injunctive relief.

3. Although the Supreme Court initially promulgated the *Younger* abstention doctrine in order to prevent federal courts from interfering with ongoing state criminal proceedings, *see* Younger v. Harris, 401 U.S. 37 (1971), the Court has since broadened the doctrine's scope. Federal courts now are admonished to refrain from taking action, absent extraordinary circumstances, when a plaintiff requests relief that would impinge on state proceedings of virtually any variety. "The policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved." Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 102 S. Ct. 2515, 2521 (1982) (holding that federal court should have abstained from interfering with ongoing state-bar disciplinary proceedings).

and the LMRDA or to the holding that section 7 of the NLRA precludes New Jersey from restr cting who may hold office in unions representing employees in the casino industry. Relying primarily on *Hill v. Florida ex rel.*

Thus, at first blush, this case appears to fall within the class of cases in which district courts should abstain from adjudicating the claims at issue. Proceedings to enforce the Act's prohibitions are essential to vindicating the state's policies, *see infra* Part III; New Jersey's interest surely is as strong as, if not stronger than, those that have been deemed sufficient in other cases. *Cf.* Trainor v. Hernandez, 431 U.S. 434 (1977) (barring interference with state proceeding to recover welfare money); Juidice v. Vail, 430 U.S. 327 (1977) (barring injunction against state civil contempt proceedings); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (barring injunction against civil enforcement action to close down theater showing obscene movies); Williams v. Red Bank Bd. of Educ., 662 F.2d 1008 (3d Cir. 1981) (barring interference with tenure- revocation proceeding).

This conclusion is not altered by the fact that the proceedings, unlike those in *Middlesex County*, are not conducted under the auspices of the judiciary. In Williams v. Red Bank Bd. of Educ., *supra*, this Court addressed the question whether the federal courts should entertain a challenge to ongoing tenure-revocation proceedings. Noting that "[a]dministrative regulation often forms a crucial aspect of a state's implementation of its laws . . .," we held that "where federal intervention into state administrative proceedings would be substantial and disruptive, and where the state proceedings are adequate to vindicate federal claims and reflect strong and compelling state interests, the district court, pursuant to *Younger*, should abstain." 662 F.2d at 1016, 1017.

While the administrative nature of the Casino Control Act's proceedings therefore do not themselves remove this case from the ambit of *Younger* abstention, I do not believe that the proceedings afford an adequate opportunity for the vindication of appellants' federal claims. *See Middlesex County, supra*, 102 S. Ct. at 2521. To be sure, as in *Red Bank*, any decision of the Casino Control Commission is appealable to the state courts, and *Younger's* premise is that state courts are as competent as are federal courts to adjudicate federal claims. Here, however, appellants attack not merely the sanctions for which the Casino Act provides; appellants also assert that their federally created rights are violated by appellants' being subjected to the administrative proceedings themselves. Thus, regard-

Watson, 325 U.S. 538 (1945), and Congress' subsequent failure to overrule *Hill*, the majority fashions a preemption doctrine that appears to leave no room for state regulation that affects section 7 rights. As I read the relevant case law, however, preemption doctrine is far from absolute, and the strength and importance of New Jersey's interest in enacting a comprehensive regulatory scheme is critical to a determination whether the provisions challenged here constitute an impermissible intrusion on federally created and protected rights. After considering two post-Hill manifestations of congressional intent strongly suggesting that state regulation is not necessarily inconsistent with national labor policy, the colossal problems associated with casino gambling, and New Jersey's interest in attempting to prevent the incidence of such problems and the poisoning of its polity, I conclude that federal labor law does not preempt the Ca-

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NOTE — *(Continued)*
less of the competence of the state judiciary, all of appellants' federal claims simply cannot be vindicated in state court.

In such circumstances, abstention is inappropriate because it would deprive a putative plaintiff of the opportunity to vindicate his federal claims. I therefore would hold that, where an individual who is subject to state proceedings to which the federal courts otherwise would defer raises a colorable claim that the proceedings themselves constitute a violation of a constitutional or statutory right, the principles of comity and federalism motivating *Younger* are superseded. *Cf.* Abney v. United States, 431 U.S. 651 (1977) (denial of claim of double jeopardy is an appealable collateral order); United States ex rel. Webb v. Court of Common Pleas, 516 F.2d 1034, 1037 (3d Cir. 1975) (pre-trial habeas relief available where alleged nature of constitutional right asserted, i.e., not to be tried twice, makes post-conviction relief incapable of vindicating the right); Jackson v. Justices, 549 F.2d 215, 220 n.1 (1st Cir.) (Coffin, C.J., dissenting) ("Whether or not there is to be a general 'futility' exception to the *Younger* doctrine, an exception seems appropriate in the case of double jeopardy claimants who are to be denied the opportunity in the state court system to demonstrate that they have a right not to be retried."), *cert. denied*, 430 U.S. 975 (1977).

sino Control Act's restrictions on the right of casino-industry employees to select certain individuals as union officials. Accordingly, I dissent from so much of the majority's opinion and judgment that reaches the contrary conclusion.

I. *Labor Preemption — The Generally Applicable Principles*

Appellants' preemption argument is relatively straighforward: section 7 of the NLRA, 29 U.S.C. §157 (1976), guarantees employees the right "to bargain collectively through representatives of their own choosing." Section 93 of the Casino Control Act, however, precludes casino employees from selecting as their bargaining representatives individuals who do not meet the Act's qualification criteria. If employees ignore the statute's admonition, the Casino Control Commission may prevent their union from collecting dues from its members, thus vitiating the union's ability to function. Appellants argue that this restriction impermissibly intrudes on their unqualified section 7 right to select their collective bargaining representatives. Indeed appellants go so far as to say that section 93's operation would "totally disrupt and prevent the application to [the casino] industry of federal policies as expressed by the [NLRA]." Br. for Appellants at 13.

The majority's reaction to this contention is aptly characterized by the following passage:

> [T]here are in labor law two separate preemption doctrines. The first, covering protected activity, is absolute. 'When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the [NLRA], or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the states free to regulate conduct so plainly within the central aim of federal reg-

> ulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.' . . . On the other hand where the activity in question is not specifically protected by section 7, but is nevertheless federally regulated, a case by case determination of the interaction between state and federal regulatory schemes is required. The *Hill v. Florida* rule, and this case, fall in the first category.

Majority op., typescript at 36-37 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959)). Although this formulation supports the majority's judgment, it does so only by drawing an inaccurate distinction and by oversimplifying preemption analysis.

There *are* certain areas in which congressional action precludes the states from regulating at all. But Congress generally does not identify these areas by creating amorphous categories of "protected activity." Rather, the areas in which Congress has usurped the field are generally defined by explicit statutory language (and, in certain rare situations, legislative history). One example of which the majority itself takes note is ERISA, which states:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. §1144 (1976); *see* Majority op., typescript at 42-44. Similar examples may be found in various individual provisions of the NLRA and the LMRDA. *E.g.*, 29 U.S.C. §§164(a), 483 (1976) (discussed *infra* at pp. 13 n.5, 22).

Most federal statutes, however, do not wear their preemptive nature on their sleeves; many provisions of

federal labor law, including section 7 of the NLRA, fall into this latter category. *See New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519, 540 (1979) (plurality op.). Obviously, it would be a mistake to infer from such statutory silence that any and all state regulation is permissible. But it also would be a mistake hastily or uncritically to characterize the particular conduct governed by such federal statutes as "plainly within the central aim of federal regulation" and therefore beyond the reach of the states. As Justice Frankfurter wrote in *De Veau v. Braisted*, 363 U.S. 144, 153 (1960) (plurality op.): "It would misconceive the constitutional doctrine of preemption . . . to decide this case mechanically on an absolute concept of free choice of representatives on the part of employees, heedless of the light that Congress has shed for our guidance."

Our task, therefore, is more complex than the majority suggests: in order for us properly to determine the implicit preemptive scope of a federal statute, we must examine thoroughly the purposes and policies of the federal scheme and the extent to which state regulation would be incompatible.

> The fact that there is some restriction due to the operation of state law does not settle the issue of pre-emption. The doctrine of pre-emption does not present a problem in physics but one of adjustment because of the interdependence of federal and state interests and of the interaction of federal and state powers.

Id. at 152.

The Supreme Court recently has restated the direction that our inquiry must take in this context:

> First, we determine whether the conduct that the state seeks to regulate or to make the basis of liability is actually or arguably protected or prohibited by the NLRA. . . . [I]f the conduct at issue is arguably prohibited or protected otherwise applicable

> state law and procedures are ordinarily preempted. . . . When, however, the conduct at issue is only a peripheral concern of the Act or touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the state of the power to act, we refuse to invalidate state regulation or sanction of the conduct. . . . The question of whether regulation should be allowed because of the deeply-rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the [NLRB's] exclusive jurisdiction or in terms of conflicting substantive rules, and the importance of the asserted cause of action to the state as a protection to its citizens.

Local 926, International Union of Operating Engineers v. Jones, 103 S. Ct. 1453, 1458-59 (1983)[4] (citations omitted) (holding state-court action preempted when conduct at issue arguably constituted unfair labor practice, even though NLRB declined to issue complaint). Proceeding within *Local 926's* framework, I therefore turn first to the question whether Congress intended section 7 to preempt all attempts by states to impose criteria on whom employees may select as their bargaining representatives. Having determined that all such regulation does not run afoul of congressional intent, I then explain why New Jersey's interest in prohibiting certain individuals from representing employees in the casino industry is so "deeply rooted in local feeling and responsibility" that it justifies any resulting intrusion on section 7 rights.

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4. Thus the majority is incorrect to the extent that it admonishes against "engaging in weighing or balancing." Majority op., typescript at 37.

Appendix A

II. *Congressional Preemptive Intent*

Like the majority, I look to that most elusive of guides — congressional intent — to determine whether state-imposed restrictions like those of the Casino Control Act are compatible with federal labor policy. Unlike the majority, however, I conclude from two manifestations of that intent — the enactment of the LMRDA and congressional acquiescence in the state-imposed restrictions upheld in *De Veau v. Braisted* — that national labor policy permits state-imposed restrictions in certain circumstances. Before turning to those factors, however, I first explain why *Hill v. Florida's* explication of congressional intent is not dispositive here.

A. *Hill v. Florida*

I agree with the majority that the starting point for our analysis must be *Hill v. Florida, supra,* for *Hill* represents the seminal explication of section 7's preemptive scope.[5] I disagree, however, with the majority's con-

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5. Ordinarily, of course, the language and legislative history of the statute itself provide the starting point for inquiries into congressional intent. In this case, however, contrary to the intimations of the majority, neither the NLRA nor the Taft-Hartley Act is of much assistance in that regard.

1. *The National Labor Relations Act of 1935 (The Wagner Act).*

In the course of congressional debate over the Wagner Act, Pub. L. No. 74-198, 49 Stat. 449 (1935), the only real mention of the relationship between federal and state regulation of the selection of bargaining representatives was an objection that the Act's regulation of local employment would violate the tenth amendment. *See* Letter from Counsel for Appellant to the Court (Dec. 3, 1982) (submitted at the request of the Court) (citing *Hearings on S. 1958* at 243-44, 840 (Mar. 11-14, 1935) (statement of James A. Emery)). The ultimate rejection of that position, however, in no way implies that Congress intended to preempt the field. Indeed as the majority eloquently demonstrates, subsequent case law implies the contrary. The majority, however, infers a preemptive intent from the fact that

clusion that the *Hill* Court's reading of congressional intent remains either definitive or controlling.

At issue in *Hill* were two provisions of a Florida statute governing all labor unions operating within the state. Section 4 of the law required that anyone serving as the "business agent" of a union be licensed by a three-man board composed of the Governor, the Secretary of State, and the Superintendent of Education. The section also provided that licenses would be issued only to individuals who had been citizens of the United States for at least ten years, had not been convicted of a felony, and were of "good moral character."

NOTE — *(Continued)*

Congress did not impose eligibility requirements for service as collective bargaining representatives despite having had drawn to its attention related problems of labor racketeering. Though the omission no doubt represented, as the majority asserts, "a conscious legislative choice," it would be equally plausible to infer that Congress preferred any such restrictions to be imposed by the states. Thus the omission of restrictions provides little insight into congressional intent.

2. *Labor Management Relations Act of 1947 (Taft-Hartley)*

Resort to the legislative history of the Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947), is equally unilluminating. These debates, too, contain no discussion of the extent to which Congress wished to preclude imposition by the states of qualifications for union representatives. *See* Garner v. Teamsters, Chauffers, and Helpers Local Union No. 776, 346 U.S. 485, 488 (1953) ("The [LMRA] . . . leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible."). Indeed only a few of Taft-Hartley's provisions refer to state action, and those provisions can support conflicting inferences. Two provisions arguably support an inference that Congress intended to preempt unless it stated otherwise. First, Congress amended §10(a), 29 U.S.C. §160(a) (1976), to eliminate the NLRB's exclusive jurisdiction, and instead to allow the NLRB, with certain restrictions, to cede jurisdiction to state agencies. Second, §14(b), *id.* §164(b), explicitly permits the states to prohibit union security clauses. The House Committee explained

The second contested provision, section 6, required every labor union operating within the state to file with the Secretary of State annual written reports containing the name of the union, the location of its offices, and the names and addresses of all union officers. The filing of these reports was a prerequisite to a union's obtaining a license to function within the state; failure to comply with either section 4 or section 6 was punishable as a misdemeanor.

Hill, a business agent within the meaning of the Florida law, and his union, Local No. 234 of the United Association of Journeymen Plumbers and Steamfitters,

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that "[i]t was never the intention of the [NLRA], as is disclosed by the legislative history of that act, to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism." H.R. Rep. No. 510, 80th Cong., 1st Sess., *reprinted in* 1947 U.S. Code Cong. & Ad. News 1135, 1166.

But if §§10(a) and 14(b) might be read to imply that state action is precluded unless specifically permitted, §14(a), 29 U.S.C. §164(a) (1976), leaves the contrary impression. That section states:

> Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

The fact that Congress felt the need explicitly to preclude states from defining supervisors as employees for purposes of collective bargaining might be read to suggest that the states do retain some freedom to enact other proscriptions not mentioned by the NLRA. The question whether §14(a) should be so interpreted is not presented here, and I do not necessarily advocate such a reading. I posit the argument only to underscore that we should be wary of inferring preemptive intent from provisions that do not expressly license the states to act.

In short, despite the fact that the Taft-Hartley Congress was clearly attuned to the problems associated with dual systems of regulation, there was no discussion of the preemptive effect of §7. The legislative history of Taft-Hartley is thus of little more help than is that of the Wagner Act.

failed to register with the state and to obtain the licenses required by sections 4 and 6. Alleging violations of the Act, the Florida Attorney General successfully sued in state court for injunctions against Hill's further functioning as the union's business agent and the union's further functioning at all until each complied with the statutory requirements.

The Florida Supreme Court upheld the injunctions; the United States Supreme Court reversed, finding both injunctions inconsistent with the NLRA. With regard to section 4, the Court stated:

> Since the Labor Board has held that an employer must bargain with a properly selected union agent despite his failure to secure a Florida license, it is argued that the state law does not interfere with the collective bargaining process. But here, this agent has been enjoined, and if the Florida law is valid he could be found guilty of a contempt for doing that which the act of Congress permits him to do. Furthermore, he could . . . be convicted of a misdemeanor and subjected to fine and imprisonment. The collective bargaining which Congress has authorized contemplates two parties free to bargain, and cannot thus be frustrated by state legislation. We hold that §4 of the Florida Act is repugnant to the National Labor Relations Act.

325 U.S. at 542. The Court reached a similar conclusion regarding section 6. *Id.* at 543.

Relying on this holding, the majority reads *Hill* as standing for the proposition that section 7 precludes the states from fixing standards or qualifications for labor unions, their officers, or their agents if such standards or qualifications would preclude the unions or their representatives from being chosen and functioning as bargaining agents under section 7 of the NLRA. The majority therefore concludes that section 93 of the Casino Control Act is preempted.

Although section 93 of the Casino Control Act does attempt to define qualifications for union officials in the casino industry, I disagree with the majority's conclusion that *Hill* therefore requires us to invalidate it. The central distinction between *Hill* and this case concerns the challenged laws themselves. The Florida statute at issue in *Hill* did nothing but establish qualification criteria for the officials of *all* labor unions in the state. Apparently the state's sole purpose was the regulation of labor unions. Section 93 of the Casino Control Act, by contrast, does not seek to regulate all unions, but only those with members working in the casino industry. Moreover, section 93 is part of a larger regulatory scheme whose purpose is by no means labor-oriented. Thus *Hill's* rejection of Florida's attempt to establish qualifications for all union officials does not lead inexorably to the conclusion that the legislation here at issue also is inconsistent with congressional intent.[6]

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6. There is another reason that *Hill* does not control all aspects of this case. The *Hill* Court made relatively clear with respect to section 4, and explicitly so with respect to section 6, that it was the statutes' sanctions that conflicted with congressional purpose. In particular, the Court noted in discussing section 6:

> The requirement as to the filing of information and the payment of a $1.00 annual fee does not, in and of itself, conflict with the Federal Act. But, for failure to comply, this union has been enjoined from functioning as a labor union. It could not without violating the injunction and also subjecting itself to the possibility of criminal punishment even attempt to bargain to settle a controversy or a strike. *It is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining.*

325 U.S. at 543 (emphasis added). Thus even if *Hill* were controlling here, this formulation suggests only that a state may not prevent a union collecting dues from its members. But this case involves more than just the Casino Control Commission's ultimate sanction power. Also at issue are the Casino Act's provisions for registration and licensing of unions representing casino employees, for

The majority seeks to buttress its construction of congressional intent by focusing on Congress' having twice enacted major labor legislation without overruling *Hill*. In particular, the majority asserts that Taft-Hartley's "reenactment of the original section 7 . . . must be considered to be a Congressional approval of the holding in *Hill* that state law on eligibility is preempted." Majority op., typescript at 30. The majority reaches a similar conclusion regarding the effect of the LMRDA:

> [I]n 1959 Congress, fully aware of the holding in *Hill v. Florida* that section 7 preempted state disqualification laws, of the rule of statutory interpretation . . . that Congressional deference to state law must be specific, and of the holdings . . . that even state regulation of activity prohibited by federal law is preempted, chose to legislate on the subject of union officer disqualification with no deference to state authority, either with respect to parallel disqualification criteria or with respect to conflicting disqualification criteria. Since both disqualification and preemption were carefully considered in the

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NOTE 6 — *(Continued)*
investigations by the Division of Gaming Enforcement, and for hearings by the Commission. By failing to distinguish these various elements of the Casino Act's scheme from the sanctions, the majority intimates that *Hill* would preclude them as well. Indeed the majority characterizes the hearings as an "illegal proceeding," Majority op., typescript at 46, without any discussion to that effect. But given the Supreme Court's holding that it was the "sanction [t]here imposed, and not the duty to report," that conflicted with the NLRA, *Hill* simply cannot be construed as affecting the validity of the non-sanction provisions; to the extent that the majority holds the contrary, I dissent from that part of the holding as well. *See also* Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 466 (1945) ("Nor can we say in the absence of any showing to the contrary that the filing of information returns will impose such burdens on any of petitioners as to interfere with the performance of their functions under the [NLRA]. . . .").

> same legislation no intention can be attributed to Congress other than preservation of the *Hill v. Florida* rule.

Majority op., typescript at 35.

Although appealing, this dwelling on non-events relies too heavily on the Supreme Court's approach in *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982). In *Curran*, the Supreme Court, addressing Congress' failure to eliminate judicially created private causes of action, stated:

> [T]he fact that a comprehensive reexamination and significant amendment of the [Commodities Exchange Act] left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy.

Id. at 381-82 (footnote omitted). But the Supreme Court's approach in *Curran* cannot be taken too far; nor can it automatically be transferred to other contexts. First, as *Curran* itself noted, congressional inaction is only evidence of congressional acquiescence; neither in *Curran* nor elsewhere has the Supreme Court said that such inaction resolves the question of congressional intent. Indeed *Curran* itself went on to review the particulars of the legislative history in order to confirm the Court's belief that Congress intended to preserve the private remedy. *See id.* at 382-88.

More importantly, *Curran's* formulation was adopted in a simpler context: Congress either did or did not intend to create a private right of action. By contrast, the question whether Congress intended to preempt state regulation of labor unions cannot so easily be answered in one case for all future cases. Rather, the answer will depend on the type and extent of regulation, the industry involved, the need for such regulation — in short, on the circumstances of each case, *see Local 926 v. Jones, supra*, 103 S. Ct. at 1458-59. Thus woodenly to transfer

the *Curran* approach to the more fluid context of labor-law preemption at once overestimates the comprehensiveness of congressional decisionmaking and underestimates the complexity of preemption doctrine.

In fact, it would be manifestly unrealistic to expect Congress to have contemplated, addressed, and resolved all (or even most) of the potential state/federal conflicts arising from overlapping regulatory schemes. As Professor Summers has pointed out in discussing the preemptive effect of the LMRDA:

> Congress did not, and could not, work out in detail the coordination of federal and state law. To do so would require at the very least a comprehensive knowledge of existing state law and the kinds of cases which came before the courts. Furthermore, it would require a clear understanding by Congress of what it was prescribing as federal law. Congress lacked both of these since such precision of knowledge and understanding is not possible.

Summers, *Pre-emption and the Labor Reform Act—Dual Rights and Remedies*, 22 Ohio State L.J. 119, 152 (1961); *cf. United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973) (noting the "inevitable incompleteness presented by all legislation"). I do not suggest that Congress was unaware of *Hill* or of extant preemption jurisprudence. Nor do I suggest that we can or should ignore Congress' failure to disavow *Hill*. But I cannot agree with the majority that we *must* read that failure as a congressional stamp of approval.

In short, I do not view either *Hill's* explication of congressional purpose or Congress' failure to reject *Hill's* holding as dispositive evidence of congressional intent to preempt all state legislation regulating union officials. Moreover, the majority's attempt to parlay the 1945 *Hill* decision into a current and continuing expression of congressional intent is belied by more recent manifestations of congressional intent that suggest the contrary. I turn now to these.

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B. *The LMRDA*

As the majority correctly points out, the NLRA, as originally enacted, placed no restrictions on employees' choice of representatives. "Their own best judgment, not that of someone else, was to be their guide." *Hill v. Florida, supra*, 325 U.S. at 541. In 1959, however, Congress enacted the LMRDA, Pub. L. No. 86-257, 73 Stat. 519 (1959), explicitly recognizing the danger of criminal infiltration of the labor movement. *See* H.R. Rep. 741, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2424, 2431. In particular, section 504(a) provides that individuals convicted of various felonies are prohibited from holding union office for five years.[7] 29 U.S.C. §504(a) (1976). Thus, whether or not restrictions on who may hold union office would be inconsistent with the unqualified free choice that the majority would read into the original section 7, Congress itself has established that the choice is no longer unfettered and that national labor policy admits of some such limitations.

The majority holds, however, that although the LMRDA promulgates federal criteria for the holding of union office, it does not permit the states to impose the additional and more stringent criteria at issue here. To support its position, the majority points out that two provisions of the LMRDA, sections 603(a) and 604, contain "savings clauses" that explicitly recognize the right of the states to provide remedies beyond those provided by the statute; Congress did not append such a clause to section 504, however, and the majority therefore infers a congressional intent to preclude the states from imposing more stringent disqualification criteria.

That conclusion is incorrect for several reasons. First, the majority fails to mention that at least one other

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7. The full text of §504 is set forth at note 8 of the majority's opinion.

section of the LMRDA *is* expressly preemptive: section 483 states that "[t]he remedy provided by this subchapter for challenging an election already conducted shall be exclusive." 29 U.S.C. §483 (1976). Thus it is possible to draw an inference, at least as strong as the majority's, that Congress intended to preempt only when it did so explicitly.

A more realistic approach is that the LMRDA's erratic allocation of enforcement jurisdiction between the state and federal governments makes futile any attempt to divine congressional intent from the absence of a savings clause in section 504. As the minority report accompanying the Senate version of the LMRDA protested:

> The . . . bill distributes its remedies . . . in accordance with no discernible standard or consistent principle. Some remedies are exclusively Federal, some are left to the States and denied to the Federal Government, some are given to the States but only if they apply Federal law, and some are allocated to both the States and Federal Government. In some instances, the majority insisted upon exclusive Federal jurisdiction asserting that absolute uniformity was essential; in others, it was insisted that diversity of treatment under varying State laws was absolutely necessary.

S. Rep. No. 187, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2407; *see also* Summers, *supra*, 22 Ohio St. L.J. at 122 ("Congressional fear of destroying valuable state remedies without providing adequate federal substitutes, and the spectre of creating a new 'no man's land,' routed all objections toward overlapping and possibly conflicting remedies. The statute became studded with assorted provisions cut from different patterns.").

More important, the majority incorrectly asserts that neither of the savings clauses subsumes the subject matter of section 504. Section 603(a) declares:

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> Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State.

29 U.S.C. §523(a) (1976).[8] The majority contends that the only state-law remedies that this provision preserves are those for breach of fiduciary duties by union officials. *See* Majority op., typescript at 33, 34. Not only is there no

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8. The other savings clause is contained in §604, which explicitly preserves the ability of the states to enact "garden variety criminal laws," *see* Majority op., typescript at 34, notwithstanding the LMRDA's "federalization" of conduct that might otherwise come within the scope of state criminal law.

> Nothing in this chapter shall be construed to impair or diminish the authority of any State to enact and enforce general criminal laws with respect to robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, or assault which inflicts grievous bodily injury, or conspiracy to commit any of such crimes.

29 U.S.C. §524 (1976). This provision, the majority notes, was enacted in response to dicta in Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776, 346 U.S. 485 (1953), and San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), that states might be precluded from regulating conduct proscribed by federal law. Although this savings clause does not authorize the type of restriction here at issue, I do not agree, for the reasons stated in text, that Congress' decision to include the clause in the LMRDA suggests that other sections without similar clauses must be read as preemptive.

support in the legislative history for such a narrow construction, *see* Summers, *supra*, 22 Ohio State L.J. at 122, 140, but the Supreme Court expressly rejected it in *De Veau v. Braisted, supra*: "§603(a) is an express disclaimer of pre-emption of state laws regulating the responsibilities of union officials, except where such preemption is expressly provided. . . ." 363 U.S. at 157.[9] Although the language was that of a four-Justice plurality, Justice Brennan, who provided the fifth vote, explained in a concurrence that the LMRDA "explicitly provides that it shall not displace such legislation of the States."[10] *Id.* at 160-61; *see also Local 1804, International Longshoremen's Ass'n v. Waterfront Commission*, 85 N.J. 606, 613, 428 A.2d 1283, 1287 (1981) (relying in part on section 603(a)'s savings clause in concluding that section 504 of the LMRDA does not preempt section 8 of the New Jersey Waterfront Commission Act).

Finally, it is important to note that one of the factors that motivated Congress to enact the LMRDA was the inability of the states to deal effectively with criminal infiltration of unions. "The LMRDA was adopted in large part because state and local authorities had failed to adopt 'effective measures to stamp out crime and corruption [in unions] and guarantee internal union democracy. . . .' Consistent with this legislative purpose, Congress could reasonably allow a state to adopt more restrictive eligibility requirements. . . ." *International Longshoremen's Association v. Waterfront Commission*,

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9. For the facts of *De Veau*, *see infra* Part II.C.

10. I note in passing that appellants here contend that only the NLRA and ERISA preempt the sanctions provided by the Casino Control Act. They have apparently abandoned the argument they advanced to the district court that the LMRDA also has such a preemptive effect. The district court rejected that argument, noting that the contention was "easily disposed of by reference to *DeVeau*." Hotel and Restaurant Employees v. Danziger, *supra*, 536 F. Supp. at 327; *see id.* at 326-28.

495 F. Supp. 1101, 1123 (S.D.N.Y. 1980), *affirmed in part and reversed in part on other grounds*, 642 F.2d 666 (2d Cir.), *cert. denied*, 454 U.S. 966 (1981). In short, it is simply too late to assert that the LMRDA supersedes section 93 of the Casino Control Act; the more reasonable interpretation is that Congress viewed such legislation as complementing the federal scheme.

C. De Veau v. Braisted:

Congressional Acquiescence in State Imposed Restrictions

In addition to establishing the non-preemptive effect of the LMRDA, *De Veau* sheds considerable light on the preemptive scope of the NLRA. De Veau was an officer of the Longshoremen's Union against whom New York invoked section 8 of its Waterfront Commission Act of 1953, a provision quite similar to the one at issue here. Section 8 provided that no one could collect dues on behalf of a waterfront union if any officer or agent of the union had been convicted of a felony and either had not been pardoned by the governor or had not received a good conduct certificate from the parole board.[11] De Veau contended that the law impermissibly restricted the rights guaranteed by sections 1 and 7 of the NLRA.

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11. Unlike §504 of the LMRDA, which bars convicted felons from holding union office for five years, §8 of the New York Waterfront Commission Act imposes a bar that may be permanent:

> No person shall solicit, collect or receive any dues, assessments, levies, fines or contributions, or other charges within the state for or on behalf of any labor organization which represents employees registered or licensed pursuant to the provisions of this act . . . if any officer, agent or employee of such labor organization . . . has been convicted by a court of the United States, or any state or territory thereof, of a felony [or] any misdemeanor involving moral turpitude . . . unless he has been subsequently pardoned therefor by the governor or other appropriate authority of the state or jurisdiction in which such

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The Supreme Court upheld the New York statute. Section 8, the Court explained in a plurality opinion by Justice Frankfurter, was enacted in conjunction with and in furtherance of an interstate compact between the states of New York and New Jersey. The compact, which established the bi-state Waterfront Commission of New York Harbor, had been approved by Congress pursuant to Article I, section 10 of the United States Constitution. Waterfront Commission Compact, Pub. L. No. 83-252, 67 Stat. 541 (1953). It therefore could not be maintained that section 8 was inconsistent with congressional intent.[12]

Appellants contend that the absence of a similar compact in this case renders *De Veau* inapposite here. This argument, however, ignores three critical aspects of *De Veau*. First, four Justices explicitly rejected an in-

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Note 11 — *(Continued)*

conviction was had or has received a certificate of good conduct from the board of parole pursuant to the provisions of the executive law to remove the disability.

N.Y. Unconsol. Laws §9933 (McKinney 1974). In fact, New York was seeking to bar De Veau from holding union office because of a 36-year old conviction for which De Veau had received a suspended sentence.

12. Although section 8 was not itself part of the compact, it had been enacted prior to submission of the compact and was intended to be part of its comprehensive scheme.

> In light of the purpose, scope and background of this New York legislation and Congress' relation to it, . . . an inference of incompatibility has no foundation. . . . Here the States presented their legislative program to cope with an urgent local program to the Congress, and the Congress unambiguously supported what is at the core of this reform. Had §8 been written into the compact, even the most subtle casuistry could not conjure up a claim of pre-emption.

De Veau, 363 U.S. at 153. Section 8 itself did not contemplate or require bi-state enforcement. *Id.* New Jersey, however, enacted a virtually identical provision. *See* N.J. Stat. Ann. §32:23-80 (West 1963).

ference of congressional intent to preempt *all* state legislation relating to employee choice of collective bargaining representatives; rather, they framed the issue as

> whether we may fairly infer a congressional purpose incompatible with the very narrow and historically explained restrictions upon the choice of a bargaining representative embodied in §8 of the New York Waterfront Commission Act. Would Congress, with a lively regard for its own federal labor policy, find in this state enactment a true, real frustration, however dialectically plausible, of that policy?

363 U.S. at 153. Congressional approval of the Waterfront Commission Compact made answering that question easy in *De Veau:* "In this case we need not imaginatively summon the likely reaction of Congress to the state legislation, as a basis for ascertaining whether due regard for congressional purpose bars the state regulation." *Id.* But Justice Frankfurter's formulation strongly implies that a court without access to similarly conclusive extrinsic evidence nevertheless should attempt to determine whether Congress would have intended to preclude the particular state legislation at issue.

Second, *De Veau* expressly recognized the importance of considering the particular situation and regulation at issue, rather than adopting a blanket approach to the preemption question.[13] Distinguishing *Hill v. Florida, supra*, Justice Frankfurter wrote:

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13. *See also* Local 1804, Internat'l Longshoremen's Ass'n v. Waterfront Comm'n, 85 N.J. 606, 613, 428 A.2d 1283, 1287 (1981):

> The leading case of *DeVeau v. Braisted* . . . suggests three criteria for determining whether a federal law preempts section 8. The criteria are: (1) the extent to which the matter regulated involves matters of local responsibility or concern; (2) the degree to which the state law interferes with federal law; and (3) the amount of interference Congress was willing to tolerate.

> Nor was it true of *Hill v. Florida*, as it is here, that the challenged state legislation was part of a program, fully canvassed by Congress through its own investigations, to vindicate a legitimate and compelling state interest, namely, the interest in combatting local crime infesting a particular industry.

363 U.S. at 155; *see also id.* at 154 ("It is instructive that this unique provision has occurred in connection with approval of a compact dealing with the prevention of crime where, because of the peculiarly local nature of the problem, the inference is strongest that local policies are not to be thwarted.").

Third, *De Veau* is most important for the insight it provides courts trying to "imaginatively summon the likely reaction of Congress" to allegedly preempted legislation. Justice Frankfurter's opinion notes that Congress approved the Waterfront Compact despite its awareness of the restrictions embodied in section 8 and despite the urging of counsel for the International Longshoremen's Association (the union most likely to be affected by section 8) that the compact's implementation would conflict with federal labor policy. *See id.* at 151 (citing Hearing on H.R. 6286, H.R. 6321, H.R. 6343, and S. 2383 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 83d Cong., 1st Sess. 136). Congress apparently perceived the problem of labor corruption on the waterfront to be of sufficient severity that state regulation would not be inimical to federal labor policy.

One could argue, of course, that the Waterfront Commission Compact constituted a specifically legislated exception to the NLRA manifesting congressional assent only to the state legislation there at issue. Such a characterization of *De Veau* and its facts, however, would be inconsistent with the compact's genesis. The Waterfront Commission Compact was presented to and considered by Congress not because its authors and sponsors believed it to embody a scheme that contra-

vened the NLRA but because the Compact contemplated the establishment of a bi-state commission to combat evils that could not be eradicated by the two states acting individually. *See* H.R. Rep. No. 998, 83d Cong., 1st Sess. 3 (1953). In other words, it was the bi-state nature of the compact, and not any potential intrusion on national labor policy, that demanded congressional attention. Nothing in the Senate or House reports accompanying the compact suggests that Congress viewed its implementation as an exception to federal labor policy; rather, the Report of the House Judiciary Committee explicitly noted that "[t]he compact to which the committee here recommends that Congress grant its consent is in no sense antilabor legislation, but rather, antiracketeering legislation." *Id.* at 6.

I do not suggest that *De Veau* compels the conclusion that the NLRA does not preempt section 93 of the Casino Control Act; certainly the absence of a majority opinion there, and of a congressionally approved compact here, would undercut any such argument. At the same time, *De Veau* cannot be written off solely because it involved a compact, especially since the most plausible interpretation of its underlying scenario is that Congress did not view all state regulation of the qualifications of union officials as incompatible with the overall federal regulatory scheme.[14] The fact that the LMRDA does not preclude the states from enacting more stringent criteria than are embodied in section 504 supports that conclusion.

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14. The majority limits its discussion of *De Veau* solely to rebutting the notion that *De Veau* overruled *Hill*. The majority concludes quite correctly that it did not; indeed appellees have not argued otherwise, contrary to the majority's assertion. But having established that *Hill* has not been overruled, the majority cursorily concludes that "*DeVeau* . . . cannot, therefore, be read as impairing the authority of *Hill v. Florida*." Majority op., typescript at 39.

Because I conclude that section 7 does not necessarily preclude such state regulation, I therefore turn to the question whether New Jersey's regulation of unions associated with the casino industry is intended to effectuate the type of deeply rooted local interest contemplated by *Local 926 v. Jones, supra.*

III. *New Jersey's Interest*

It is virtually beyond dispute that comprehensive regulation of casino gambling, including regulation of unions representing industry employees, is "important . . . to [New Jersey] as a protection to its citizens."[15] *Id.* at 1459. Gambling is an industry that is particularly sus

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Note 14 — *(Continued)*

This off-hand dismissal is too hasty. First, to the extent that the majority predicates its conclusion on *De Veau's* failure to overrule *Hill*, it is important to keep in mind that the Supreme Court continually modifies prior holdings without overruling them. *See, e.g.*, EEOC v. Wyoming, 103 S. Ct. 1054 (1983) (limiting, without overruling, National League of Cities v. Usery, 426 U.S. 833 (1976)). Indeed Justice Frankfurter's opinion in *De Veau* expressly distinguished *Hill*, and not solely on the basis of the compact: "Nor was it true of *Hill v. Florida*, as it is here, that the challenged state legislation was part of a program, fully canvassed by Congress through its own investigations, to vindicate a legitimate and compelling state interest, namely, the interest in combatting local crime infesting a particular industry." 363 U.S. at 155.

Second, the majority's analysis ignores *De Veau's* refusal blindly to apply *Hill's* prohibition against state imposition of dues-collecting sanctions. Indeed the fact that Congress acquiesced in the type of state-imposed sanctions struck down in *Hill* further undercuts the majority's reliance on congressional failure explicitly to overrule *Hill*.

15. Casino gambling traditionally has been considered to be within the purview of the states to regulate, and one court even has suggested that "gaming is a matter reserved to the states within the meaning of the Tenth Amendment . . . [leaving] no room for federally protected constitutional rights," State v. Rosenthal, 93 Nev. 36, ____, 559 P.2d 830, 836, *appeal dismissed*, 434 U.S. 803 (1977).

ceptible to infiltration and control by organized crime and racketeers. *See* National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, *The Development of the Law of Gambling: 1776-1976* (1977). Not only is this vulnerability documented by gambling's "checkered history in other jurisdictions," Staff Policy Group on Casino Gambling, *Second Interim Report* 2 (1977),[16] but the FBI has labelled gambling the "lifeblood of organized crime," *Hearings Before the Commission on the Review of the National Policy Toward Gambling* (May 10, 1976) (testimony of Frederick Fehl, Acting Assistant Director, FBI); *see United States v. Garrison*, 348 F. Supp. 1112, 1119 (E.D. La. 1972). As the Superior Court of New Jersey remarked in a similar context, "[t]he undesirability of an association between those previously convicted of a crime or those in affinity with such a person and this sensitive 'business of racing and the legalized gambling attendant thereupon,' is too apparent to justify extended discussion." *Niglio v. New Jersey Racing Commission*, 158 N.J. Super. 182, 188, 385 A.2d 925, 928 (App. Div. 1978).

Gambling does affect interstate commerce, however, and Congress has enacted a number of laws regulating the interstate aspects of gambling, *see, e.g.*, 15 U.S.C. §§1171-1178 (1976) (barring interstate shipment of gambling devices); 18 U.S.C. §§1082-1083 (1976) (prohibiting gambling on certain ships); *id.* §1084 (1976) (barring transmission of wagering information over interstate wires); *id.* §§1301-1307 (1976 & Supp. V 1981) (regulating lotteries); *id.* §1953 (1976 & Supp. V 1981) (barring interstate shipment of gambling paraphernalia).

16. *See also* Marshall v. Sawyer, 301 F.2d 639, 648-50 (9th Cir. 1962) (Pope, J., concurring) (discussing the known hazards of gambling that led to strict controls in Nevada); Nevada Tax Comm'n v. Hicks, 73 Nev. 115, ____, 310 P.2d 852, 854 (1957) ("Throughout this country, . . . gambling has necessarily surrounded itself with an aura of crime and corruption.").

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Legalized casino gambling is particularly attractive to organized crime for two reasons:

> First, a casino contains a vast amount of liquid assets in the form of cash and gaming chips which are very attractive and susceptible to misappropriation. Second, these liquid assets remain uncounted and unrecorded as the gaming activity takes place. Casinos are unique because millions of dollars are continually changing hands among thousands of people on the casino floor without any record being made of how much money is exchanged, how many people are involved, or who those individuals are.

Santaniello, *Casino Gambling: The Elements of Effective Control*, 6 Seton Hall Legis. J. 23, 23 (1982) (footnote omitted); *see also* New Jersey Commission of Investigation, *Report and Recommendations on Casino Gambling*, at III (1977) ("[T]he nature of the industry . . . makes it a vulnerable target for criminal intrusion.").

Awareness of the attractiveness of casino gambling to racketeers and concern that the industry therefore could not remain "clean" contributed to the defeat in 1974 of a state-wide referendum to allow casino gambling in Atlantic City; a second referendum passed in 1976 only after proponents assured the public that New Jersey would have the "strongest regulations of casinos in the world," that organized crime would be prevented from infiltrating the industry, that operating controls would be stringent, and that only those individuals of the highest character, integrity, and competence would be permitted to participate in casino operations. *See, e.g.*, *Strongest Law in World Offered for Atlantic City Casinos*, N.Y. Daily News, Oct. 1, 1976, at 40; *Lawmakers Reveal Casino Guidelines*, Newark Star Ledger, Oct. 1, 1976, at 1.[17]

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17. *Cf.* Knight v. City of Margate, 86 N.J. 374, 392, 431 A.2d 833, 842 (1981) ("Gambling is an activity rife with evil, so prepotent its mischief in terms of the public welfare and morality that it is governed directly by the [state] Constitution itself.").

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Following the voters' approval of the referendum, the legislature held extensive hearings and, together with the Governor, commissioned reports on how best to insure that Atlantic City's casinos would remain clean. *See Hotel and Restaurant Employees v. Danziger, supra*, 536 F. Supp. at 322. These studies concluded that merely keeping organized crime from infiltrating the industry would be an insufficient goal; the success of the venture depend on gaining and retaining public trust in the industry's integrity. Thus the studies recommended legislation directed toward preventing even the appearance of impropriety. *See Report and Recommendations, supra; Second Interim Report, supra.* The reports also made clear that the achievement of those goals would require the regulation of every aspect of the industry, and not just the gaming operations.

> Profitability is . . . not a direct function of the quality of gaming or of the environment in and around the casino. Corporate corruption, cheating, loansharking, overextension of credit, insobriety, prostitution and a honky-tonk atmosphere are not antithetical to a desire for profit, and in the industry are occasionally viewed as legitimate societal overhead so long as they encourage, or at least do not interfere with, the vitality of the gambling market.
>
> The interests of the State in the success of casino gambling are not coterminous with the interests of the entrepreneur. While the latter measures a net return on investment against the degree of risk, the State must measure social and economic benefits against offsetting social, economic and environmental costs. What is acceptable by one measure may be unacceptable by the other. The staff policy group has concluded that the *uniqueness of the industry, taken with its potential societal consequences and its checkered history in other jurisdictions, compels a state regulatory interest in virtually every aspect of casinos and related operations.*

Staff Policy Group, *Second Interim Report*, *supra*, at 1-2 (emphasis added).

The State Commission of Investigation (SCI), in formulating more specific recommendations, operated on the same premises and concluded that "only the most stringent of gambling control laws can thwart the infiltration of casinos and related services and suppliers by organized crime." Commission of Investigation, *Report and Recommendations, supra*, at II.[18] The SCI then made explicit that it was concerned not only with related services and suppliers but with labor unions as well. La-

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18. The SCI went into more detail in formulating its specific recommendations:

> Although the State Commission of Investigation and segments of law enforcement have been highly successful in removing many identified members of organized crime from New Jersey society, there remains a well-organized highly functional organized crime network in this state. Additionally, it is important to note that the appearance of organized crime is presently changing. As traditional sources of illegal funds become more limited and more easily detected and prosecuted, elements of organized crime have become significantly more interested in investing funds in legitimate enterprises.
>
> The infiltration of legitimate business by organized crime is a situation which society should be aggressive to prevent. In addition to providing a ready source of funds to capitalize illegal ventures, a convenient cash flow to disguise illegal profits, and an ostensibly legitimate occupation for organized crime members and associates, an incursion into legitimate enterprise is often accompanied by extortion, loansharking, commercial bribery, tax violations and anti-trust law infringements.
>
> Thus, it is the position of the S.C.I. that any casino gambling legislation should not only preserve and protect the integrity of the operation of casinos in Atlantic City, but should also foreclose the possibility of opening up new and fertile areas of legitimate business enterprise to elements of organized crime.
>
> The S.C.I.'s continuing organized crime program discloses that there are several identifiable legitimate enterprises which have long been a target of infiltration by organied [sic] crime. Further, the S.C.I.'s monitoring of the workings of organized crime in Atlantic City discloses substantial movement by

bor unions, the SCI asserted, could offer organized crime an entree into the casino industry:

> The S.C.I.'s experience and collected intelligence regarding organized crime strongly suggests that there are few better vehicles utilized by organized crime to gain a stranglehold on an entire industry than labor racketeering. Organized crime control of certain unions often requires the legitimate businessmen who employ the services of the union members to pay extra homage to the representatives of the underworld. Moreover the ready source of cash which union coffers provide can be employed as financing of all sorts of legitimate or illicit ventures.

Id. at 1-H.[19] The SCI therefore urged that unions representing employees of the casinos or their adjoining ho-

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organied [sic] crime in contemplation of a casino operation and the potential which it represents. The general approach which the S.C.I. deems advisable is the exposure to stringent licensing scrutiny by the gambling regulatory body of all industries of concern and particularly more of an ancillary nature.

The most efficacious legislative scheme must strike the proper balance between the magnitude of the State's interest in licensing certain service industries and the required administrative resources which will be necessitated. It would be overly burdensome to require licensure for all parties entering into a contractual relationship with the licensed hotel yet, as has been stated, it would be against the interests of the state not to require licensure [in] most other cases. The required scrutiny of the proposed provider should be directly proportional to the risk to the gaming industry and society as a whole. The risk is twofold: (a) that undesirable elements infiltrate the gaming industry through *direct involvement with the casino operation*, and (b) that undesirable elements either *indirectly affect the gaming industry through involvement with the hotel or are financially benefitted through profits recouped from endeavors relating to casino gaming.*

Id. at 1-C to 2-C (emphasis in original).

19. New Jersey's Attorney General recently expressed a simi-

tels be required to satisfy the same stringent qualification criteria required of casino operators. *Id.* at 1-H, 2-H.

Against this background, the New Jersey legislature enacted the Casino Control Act, including the provision challenged here. At the outset, the legislature displayed its awareness of the potential crime problems and their magnitude. The Act expressly declares its goals to include preventing criminal elements from gaining a foothold in the industry and avoiding any public perception that such a foothold even is available.[20]

NOTE 19 — *(Continued)*
lar view when testifying before the Senate Permanent Subcommittee on Investigations:

> Organized labor is in a prime position to exert tremendous pressure over the casino industry . . . . What would a casino owner pay for labor peace? How much is it worth to keep a business that grosses between $500,000 and $1 million a day free of a strike? A corrupt union could extort outright payments or use its power of persuasion to dictate what firms get the lucrative ancillary service contracts within the casino industry.

Quoted in Court Delay Seen in Casino Dispute, N.Y. Times, Oct. 10, 1982, at 55, col. 1.

20. The Act enumerates seventeen policy declarations and findings of fact, four of which are relevant here:

> (6) An integral and essential element of the regulation and control of such casino facilities by the State rests in the public confidence and trust in the credibility and integrity of the regulatory process and of casino operations. To further such public confidence and trust, the regulatory provisions of this act are designed to extend strict State regulation to all persons, locations, practices and associations related to the operation of licensed casino enterprises and all related service industries as herein provided. In addition, licensure of a limited number of casino establishments, with the comprehensive law-enforcement supervision attendant thereto, is further designed to contribute to the public confidence and trust in the efficacy and integrity of the regulatory process.
>
> (7) Legalized casino gaming in New Jersey can attain, maintain and retain integrity, public confidence and trust, and

The Act seeks to achieve these goals in two ways. First, the legislature created two separate agencies — the Casino Control Commission and the Division of Gaming Enforcement — to share responsibility for insuring the integrity of the casino industry; a system of checks and balances exists between the two agencies to keep the regulatory process itself above reproach.[21] Sec-

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remain compatible with the general public interest only under such a system of control and regulation as insures, so far as practicable, the exclusion from participation therein of persons with known criminal records, habits or associations, and the exclusion or removal from any positions of authority or responsibility within casino gaming operations and establishments of any persons known to be so deficient in business probity, ability or experience, either generally or with specific reference to gaming, as to create or enhance the dangers of unsound, unfair or illegal practices, methods and activities in the conduct of gaming or the carrying on of the business and financial arrangements incident thereto.

. . . .

(9) Since casino operations are especially sensitive and in need of public control and supervision, and since it is vital to the interests of the State to prevent entry, directly or indirectly, into such operations or the ancillary industries regulated by this act of persons who have pursued economic gains in an occupational manner or context which are in violation of the criminal or civil public policies of this State, the regulatory and investigatory powers and duties shall be exercised to the fullest extent consistent with law to avoid entry of such persons into the casino operations or the ancillary industries regulated by this act.

. . . .

(15) Continuity and stability in casino gaming operations cannot be achieved at the risk of permitting persons with unacceptable backgrounds and records of behavior to control casino gaming operations contrary to the vital law enforcement interest of the State.

N.J. Stat. Ann. §5:12-1 (West Supp. 1982).

21. For a comprehensive discussion of this regulatory process, including the mechanisms designed to guarantee its integrity, *see* Cohen, *The New Jersey Casino Control Act: Creation of a Regulatory System*, 6 Seton Hall Legis. J. 1 (1982).

ond, and more important for our purposes, the legislature accepted the recommendations of the SCI and the Governor's Staff Policy Group regarding the necessary breadth of control and granted the two agencies authority to regulate all aspects of the casino industry, including labor unions. As the Commission points out in its brief, the statutory and administrative controls over the casino gaming industry are "extraordinary pervasive and intensive." *Knight v. City of Margate*, 86 N.J. 374, 381, 431 A.2d 833, 836 (1981).

In sum, New Jersey's comprehensive regulation of the casino industry is a matter of intense and extraordinary local interest. Such regulation is not only essential to the State's struggle to maintain the integrity of the industry, but the very prospect of such comprehensive legislation was the basis upon which New Jersey's citizens consented to casino gambling in the first place. Given the unique nature of the industry — in particular its tremendous, unmonitored cash flow and its consequent attractiveness to racketeers and organized crime — the concerns of the legislature and citizenry cannot be characterized as anything less than "deeply rooted in local feeling and responsibility." *Local 926 v. Jones, supra*, 103 S. Ct. at 1459.

IV. *Preemption Doctrine Applied*

As I noted at the outset, *Local 926 v. Jones* teaches that the NLRA does not necessarily preempt state legislation when the state's interest is as strong as New Jersey's is here. Rather, "[t]he question of whether regulation should be allowed . . . involves a sensitive balancing of any harm to the regulatory scheme established by Congress . . . and the importance of the asserted cause of action to the state as a protection to its citizens." *Local 926 v. Jones, supra*, 103 S. Ct. at 1459. It is indisputable that New Jersey's interest in comprehensive regulation of casino gambling is "deeply rooted

in local feeling and responsibility," *id.* at 1458, and that the restrictions on persons who may be associated with the industry — in whatever capacity — are of manifest importance to the State "as a protection to its citizens," *id.* at 1459. And while I acknowledge that invocation of the sanctions provided by section 93 of the Casino Control Act may curtail the full exercise of section 7 rights, given the unique dangers posed by criminal infiltration of casino gambling, I cannot say that New Jersey's interest is outweighed by "any harm to the regulatory scheme established by Congress." Rather, Congress' acquiescence in the legislation at issue in *De Veau* suggests a congressional perception that, in situations where the threat to the welfare to the state is so pervasive and so well-documented that the need for comprehensive state regulation is manifest, such regulation will be permissible even if it includes a component that directly restricts section 7 rights.[22] I believe such situations to be rare, but I also believe that one is presented here.

Moreover, as the Court of Appeals for the Second Circuit has noted in discussing section 8 of the New York Waterfront Commission Act, the type of restrictions here at issue are a rather limited intrusion on section 7 rights. "The Act does not prohibit the election of these men to offices in [other] locals nor does it prohibit the collection of dues outside New York State from [other] longshoremen. It simply prevents corrupt union officials from contributing to a longstanding problem of criminal wrong-doing on the New York waterfront."[23] *In-*

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22. I read *Local 926* as consistent with this view.

23. *See also* Hazelton v. Murray, 21 N.J. 115, 123, 121 A.2d 1, 5-6 (1956) (Brennan, J.) (sustaining §8 of New Jersey's Waterfront Commission Act) ("If the conviction of crime is a proper consideration related to the public interest for the purposes of licensing and registering waterfront workers, much more so is the provision here under review which would wrest from the vicious criminal combine the means through which the corrupt conspiracy was perpetrated.").

ternational Longshoremen's Association v. Waterfront Commission, 642 F.2d 666, 672 (2d Cir.), *cert. denied*, 454 U.S. 966 (1981).

Indeed the parallels between the New York Waterfront Commission Act and the Casino Control Act are striking. Like the New York Waterfront Commission Act, *see De Veau*, 363 U.S. at 147-51, the Casino Control Act was passed only after extensive hearings, reports, and public outcry demanded the institution of stringent regulation to keep the industry clean. In both cases, the intent and effect of the state regulation was not directed particularly toward labor but, rather, toward the establishment of a comprehensive scheme in which union regulation was only one necessary component.[24] To be sure, the New York legislature enacted the Waterfront Commission Act only after the situation on the docks had already reached "appalling" proportions, *see id.* at 147, and New York's action therefore might be said to have been based on "harder" evidence of need than was New Jersey's. But to write into preemption jurispru-

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24. Like the Casino Control Act, the legislation to clean up the New York Waterfront did not merely regulate union officials:

> [The Commission has the] power to license, register and regulate the waterfront employment of pier superintendents, hiring agents, longshoremen and port watchmen, and to license and regulate stevedores. [The compact] entirely prohibits one class of waterfront employment, public loading, found to be unnecessary and particularly infested with corruption. . . . The issue of licenses to engage in waterfront occupations, or the right to be registered, depends upon findings by the Commission of good character. In particular, past convictions for certain felonies constitute specific disabilities for each occupation, with discretion in the Commission to lift the disability, except in the case of port watchmen, where it constitutes an absolute bar to waterfront employment. A new procedure for the employment of longshoremen is also provided under the supervision of the Commission, replacing the archaic, corrupt 'shape-up.'

De Veau, 363 U.S. at 149.

dence a distinction between remedial and prophylactic legislation would prevent states from acting until an industry is so rife with corruption that "criminals, racketeers, and hoodlums [have] acquired a stranglehold," *Hazelton v. Murray*, 21 N.J. 115, 120, 121 A.2d 1, 4 (1956) (Brennan, J.) (describing condition of New York/New Jersey waterfront prior to compact and sustaining constitutionality of provision of New Jersey law identical to provision sustained in *De Veau*). The inefficiency of such a distinction is manifest; to say that federal labor policy requires it would offend reason.

The majority rejects New Jersey's contention that gambling is unique and notes that other industries, such as solid-waste disposal, "have also been identified as susceptible of infiltration by organized crime." Majority op., typescript at 40-41 (footnote omitted). Although it is true that other industries have been so identified, the majority's argument ignores the specifics of this situation and this industry. The casino industry *is* different: the huge number and the staggering aggregate amount of unrecorded cash transactions[25] make legalized gambling far more attractive to and ripe for criminal infiltration than are other industries. Moreover, New Jersey has adequately demonstrated through studies, hearings, and the experience of other jurisdictions, that these dangers can be avoided only by means of a comprehensive scheme that includes regulation of all aspects of the industry.[26] We are not dealing here with a display of anti-labor animus on the part of the New Jersey legislature; rather, we have before us a conscientous and well-reasoned attempt to erect a breakwater against a tide of vice and corruption that could engulf Atlantic City's casinos.

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25. The "handle," i.e., the total amount of money bet, in Atlantic City's casinos was more than $5 billion in 1982.

26. The majority accurately notes that the NLRB has consistently asserted jurisdiction over the casino industry; indeed I do not

Finally, the mere fact that another state may attempt to regulate another industry in a way or to an extent that effectively would undermine the right of employees to choose their bargaining representatives does not mean that section 93 offends federal labor policy.

NOTE 26 — *(Continued)*
contend that the NLRB should not do so here. But the majority implies that the exercise of the NLRB's jurisdiction cannot be reconciled with state regulation such as section 93 and that section 93 must therefore be deemed incompatible with the NLRA's regulatory framework. This implication is incorrect, for the NLRB continues to exercise jurisdiction over the New York waterfront, despite the vitality of the restriction upheld in *De Veau*.

In addition, I note that the NLRB, in declining jurisdiction over labor disputes in the dog-racing and horse-racing industries, has suggested that state regulation of labor, when it is part of a pervasive industry-wide scheme, is not necessarily inconsistent with national labor policy:

> In prior decisions, the Board declined to assert jurisdiction over these industries noting, inter alia, the extensive State control over the industries. It appears that State law sets racing dates of the tracks; State law determines the percentage share of the gross wagers that goes to the State; and State law determines the percentage of gross wagers to be retained by the track. In addition, the State licenses employees, exercises close supervision over the industries through State racing commissions, and in many States retains the right to effect the discharge of employees whose conduct jeopardizes the "integrity" of the industry. As the industries constitute a substantial source of revenue to the States, a unique and special relationship has developed between the States and these industries which is reflected by the States' continuing interest in and supervision over the industries.

Declination of Assertion of Jurisdiction, 38 Fed. Reg. 9537 (1973) (codified at 29 C.F.R. §103.3 (1982)). Although a district court held that the rule violates the NLRB's statutory mandate, *see* New York Racing Ass'n v. NLRB, 110 L.R.R.M. 3177 (E.D.N.Y. 1982) (NLRB may decline jurisdiction only over industries not substantially affecting interstate commerce), that decision was recently vacated, Nos. 82-6252, -6258 (2d Cir. May 10, 1983) (district court does not have jurisdiction to review such NLRB rules).

The admitted difficulty of drawing lines does not allow us to abdicate our responsibility to do so. There are distinctions both between the provisions at issue here and the broad regulation of labor unions struck down in *Hill*, as well as between the pressing need to regulate this industry and the mere desire to do so in other areas. These distinctions are not merely theoretical; they are readily apparent and enormously important.

In sum, given the magnitude of New Jersey's interest in comprehensively regulating of the casino industry, and my conclusion that such regulation does not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (footnote omitted), I would hold that the NLRA does not preempt section 93 of the Casino Control Act.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Opinion of United States District Court for the District of New Jersey

UNITED STATES DISTRICT COURT
for the District of New Jersey

Civ. A. No. 81-2630

536 *F. Supp.* 317 (D.N.J. 1982)

Decided March 22, 1982

On Motion for Temporary Injunction Pending Appeal
April 12, 1982

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and Frank Gerace,

Plaintiffs,

v.

Martin DANZINGER, Acting Chairman, Donald Thomas, Commissioner, Madeline McWhinney, Commissioner, Carl Zeitz, Commissioner, Casino Control Commission and G. Michael Brown, Director, Department of Law and Public Safety, Division of Gaming Enforcement and Department of Law and Public Safety, Division of Gaming Enforcement and Thomas H. Kean, Governor,

Defendants.

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Bernard N. Katz, N. Michael Katz, Meranze, Katz, Spear & Wilderman, Atlantic City, N. J., for plaintiffs.

Robert J. Genatt, Lawrenceville, N. J., Gen. Counsel, New Jersey Casino Control Comm., by Thomas N. Auriemma, Deputy Director, Legal Div., Trenton, N. J., for defendants Danzinger, Thomas, McWhinney, Zeitz and Casino Control Comn.

Irwin I. Kimmelman, Atty. Gen. by Michael R. Cole, G. Michael Brown, Asst. Attys. Gen. Anthony J. Parrillo, James M. Flanagan, Deputy Attys. Gen., Div. of Gaming Enforcement, Trenton, N. J., for defendants Brown, Div. of Gaming Enforcement and Kean.

Robert I. Segal, Haddonfield, N. J., and John J. Reynolds, Chicago, Ill., for amicus curiae Hotel and Restaurant Employees and Bartenders Union, AFL-CIO.

Howard J. Casper, Cherry Hill, N. J., for amicus curiae International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 331.

Thomas P. Foy, Hartman, Schlesinger, Schlosser & Faxon, Mount Holly, N. J., for amicus curiae New Jersey State AFL-CIO.

BROTMAN, District Judge.

New Jersey's Casino Control Act, L.1977, c. 110, § 1 *et seq.*, as amended by L.1978, c. 7, § 1 *et seq.*, N.J.Stat. Ann. § 5:12-1 *et seq.* (West Supp.1981) (hereinafter the "Act"), establishes the conditions under which the nascent casino gambling industry in Atlantic City, New Jersey, is to be regulated. Section 93 of the Act, N.J. Stat.Ann. § 5:12-93 (West Supp.1981), prohibits labor organizations representing employees of casinos and

casino hotels from collecting dues from those employees, or from administering pension and welfare funds, unless the union has registered with the Casino Control Commission and the union's officers, agents and key employees have met certain qualifications delineated in § 86 of the Act. N.J.Stat.Ann. § 5:12-86 (West Supp.1981). (Portions of the Casino Control Act are set forth in the Appendix to this opinion.)

Hotel and Restaurant Employees and Bartenders International Union Local 54 (hereinafter "Local 54"), and its president, Frank Gerace, filed this action seeking a declaration that these provisions of the Casino Control Act may not constitutionally be enforced against them. Plaintiffs also seek injunctive relief and damages. It is pleaded that application of the Act against the plaintiffs is preempted by the National Labor Relations Act of 1935, *infra*, the Labor-Management Reporting and Disclosure Act of 1959, *infra*, and the Employee Retirement Income and Security Act of 1974, *infra*, and that the Act is thereby invalidated under the Supremacy Clause of the Constitution. U.S.C.A. Const. Art. VI, cl. 2 (West 1968). Plaintiffs also plead that the Act is vague and overbroad, that it is invalid under the First and Fourteenth Amendments and under the Contract Clause. U.S.C.A.Const. Art. I, § 10 (West 1968). The case is currently before the court on a motion for a preliminary injunction, in support of which plaintiffs have advanced their arguments under the Supremacy Clause, their vagueness and overbreadth claims and their First Amendment claims.

Appendix B

I. BACKGROUND

Pursuant to the power granted it by the Constitution of the State of New Jersey, N.J.Stat.Ann.Const. Article 4, § 7, ¶ 2 D (West Supp. 1981), the New Jersey Legislature enacted the Casino Control Act, *supra*, in 1977, establishing the conditions under which casino gambling in Atlantic City would be conducted and controlled. The Act establishes the Casino Control Commission in the Department of Treasury, N.J. Stat.Ann. § 5:12-5 (West Supp.1981), and the Division of Gaming Enforcement in the Department of Law and Public Safety. N.J.Stat. Ann. § 5:12-55 (West Supp.1981). The Casino Control Commission is charged with the duties of passing on applications for licenses, N.J.Stat.Ann. §§ 5:12-63 and 64 (West Supp.1981), and the Division of Gaming Enforcement is empowered to investigate the qualifications of applicants for licenses, and to present its views on such applications to the Commission. N.J.Stat.Ann. §§ 5:12-76 through -79 (West Supp.1981).

In connection with the development of casino gambling in Atlantic City, the Legislature has found and declared seventeen aspects of "the public policy of this State," and has listed them in § 1 of the Act. N.J.Stat.Ann. § 5:12-1 b (West Supp.1981). It is in consonance with these aspects of public policy that the Act is likely to be enforced. *New Jersey Builders Owners and Managers Association* v. *Blair*, 60 N.J. 330, 338, 288 A.2d 855 (1972). The ones which are most pertinent to this court's inquiry are as follows:

> (6) An integral and essential element of the regulation and control of such casino facilities by the State rests in the public confidence and trust in

the credibility and integrity of the regulatory process and of casino operations. To further such public confidence and trust, the regulatory provisions of this act are designed to extend strict State regulation to all persons, locations, practices and associations related to the operation of licensed casino enterprises and all related service industries as herein provided. In addition, licensure of a limited number of casino establishments, with the comprehensive law-enforcement supervision attendant thereto, is further designed to contribute to the public confidence and trust in the efficacy and integrity of the regulatory process.

(7) Legalized casino gaming in New Jersey can attain, maintain and retain integrity, public confidence and trust, and remain compatible with the general public interest only under such a system of control and regulation as insures, so far as practicable, the exclusion from participation therein of persons with known criminal records, habits or associations, and the exclusion or removal from any positions of authority or responsibility within casino gaming operations and establishments of any persons known to be so deficient in business probity, ability or experience, either generally or with specific reference to gaming, as to create or enhance the dangers of unsound, unfair or illegal practices, methods and activities in the conduct of gaming or the carrying on of the business and financial arrangements incident thereto.

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(9) Since casino operations are especially sensitive and in need of public control and supervision, and since it is vital to the interests of the State to prevent entry, directly or indirectly, into such operations or the ancillary industries regulated by this act of persons who have pursued economic gains in an occupational manner or context which are in violation of the criminal or civil public policies of this State, the regulatory and investigatory powers and duties shall be exercised to the fullest extent consistent with law to avoid entry of such persons into the casino operations or the ancillary industries regulated by this act.

• • •

(13) It is in the public interest that the institution of licensed casino establishments in New Jersey be strictly regulated and controlled pursuant to the above findings and pursuant to the provisions of this act, which provisions are designed to engender and maintain public confidence and trust in regulation of the licensed enterprises, to provide an effective method of rebuilding and redeveloping existing facilities and of encouraging new capital investment in Atlantic City, and to provide a meaningful and permanent contribution to the economic viability of the resort, convention, and tourist industry of New Jersey.

• • •

(15) Continuity and stability in casino gaming operations cannot be achieved at the risk of permitting persons with unacceptable backgrounds

and records of behavior to control casino gaming operations contrary to the vital law enforcement interest of the State.

N.J.Stat.Ann. § 5:12-1 b (West Supp.1981).

These declarations reveal a serious concern with the possibility that casino gambling in Atlantic City—along with the governmental entities which are bound to control it—has the potential to serve as a vehicle for the violence, extortion and lawlessness which have plagued gaming industries in other contexts. The Legislature had before it many studies on the possibilities for corruption and crime which might have been created by the introduction of legalized gaming. *E.g., Second Interim Report of the New Jersey Governor's Staff Policy Group on Casino Gambling* (Feb. 17, 1977); *Report and Recommendations by the State Commission of Investigation* (April 1977). The reports were based on studies of gaming industries around the world and in other states. *See Second Interim Report of the Staff Policy Group, supra.* Numerous public hearings on the matter were also held. Certainly it was no puritanical aversion to games of chances which brought the Legislature to the conclusion that strict control over all aspects of the new industry would be necessary to prevent it from befouling all that it touched and all that touched it. It is unquestioned that the history of legalized gambling in all of its forms demonstrates that it is extraordinarily susceptible to control and abuse by criminals employing methods of violence and bribery. *Id.;* National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, *The Development of the Law of Gambling: 1776-1976* (1977). The roots of corruption, spread far enough,

can undermine the very foundations of public confidence in government itself, and the recitations of public policy in the Act show an awareness of this.[1] Accordingly, a comprehensive licensing system was established, which extended not only to those who were to own, manage and be employed by casinos, but also to ancillary services, such as the supplying of gaming devices. N.J. Stat.Ann. §§ 5:12-80 through -95.11 (West Supp.1981).

Labor organizations are not immune to the possibilities of corruption. The Governor's Staff Policy Group reported, "Both legally recognized and unrecognized employee organizations have been reported to be a source of corruption in other jurisdictions." *Second Interim Report, supra,* at 46. The State Commission of Investigation reported that there were:

> few better vehicles utilized by organized crime to gain a stranglehold on an entire industry than labor racketeering. Organized crime control of certain unions often requires the legitimate businessmen who employ the services of the union members to pay extra homage to the representatives of the underworld. Moreover the ready source of cash which union coffers provide can be employed as financing of all sorts of legitimate or illicit ventures.

Report and Recommendations, supra, at 2. It can not be doubted that the large number of unrecorded transactions which are associated with gambling can multiply the effects of the phenomenon described by the Commission of Investi-

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[1] "The whore and gambler, by the state Licensed, build that nation's fate."

Wm. Blake, *Auguries of Innocence,* (Pickering Manuscripts, *c.* 1801).

gation. In enacting the Racketeer Influence and Corrupt Organizations (RICO) Act, 84 Stat. 941, 18 U.S.C.A. §§ 1961 *et seq.* (West Supp.1981), in 1970, Congress recognized the explosiveness of the combination of labor racketeering and gambling by declaring:

> [O]rganized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitations; . . . this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions. . . .

Pub.L. 91-452, § 1, *reprinted following* 18 U.S.C.A. § 1961 (West Supp.1981).

Similar to the licensing provisions discussed above is § 93 of the Act, which requires that "[e]ach labor organization, union or affiliate seeking to represent employees licensed under this act and employed by a casino hotel or a casino licensee shall register with the commission annually. . . ." N.J.Stat.Ann. § 5:12-93 a (West Supp.1981). Although the registration requirement differs in some respects from the licensing requirement which applies to a casino service industries, N.J.Stat.Ann. § 5:12-92 (West Supp.1981), casino hotel employee, N.J.Stat.Ann. § 5:12-91 (West Supp.1981), its effect is similar to the licensing requirement. Section 93 goes on to state that officers, agents and principal employees of the labor organization, union or affiliate requqired to register must pass muster under § 86 of the Act, which lists criteria for disqualification of applicants for licenses. N.J.Stat.Ann. §§ 5:12-86 and 93 b (West Supp.1981). Failure of key employees of such a union to

meet the standards of § 86 does not bar the union from acting as the collective bargaining representative of the licensed employees, but it does visit certain other restrictions on the union; *i.e.*, the union is forbidden to receive any dues from any licensed casino employee, and is also forbidden to "administer any pension or welfare funds." N.J.Stat.Ann. § 5:12-93 b (West Supp.1981). As with hotel employee licenses, N.J.Stat.Ann. § 5:12-91 e (West Supp. 1981), the Casino Control Commission is given discretion to "waive any disqualification criteria [of § 86] consistent with the public policy of this act and upon a finding that the interests of justice so require." N.J.Stat.Ann. § 5:12-93 b (West Supp.1981).

No one involved in these proceedings has argued that it was irrational for the Legislature to decide to subject representatives of licensed employees to some form of regulation and control. The wisdom of the legislation is not here at issue. The question is a narrower one of the scope within which the state's regulation of such unions is permitted to operate by the Constitution, the breadth of the inquires which may be made, and the nature of the sanctions which may be applied.

We start with the premise that the state's regulation of gambling is subject to constitutional limitations. *Bally Manufacturing Corp.* v. *Casino Control Commission*, 534 F. Supp. 1213, 1220 (D.N.J.1982); *Marshall* v. *Sawyer*, 301 F.2d 639 (9th Cir. 1962). The argument of the Division of Gaming Enforcement that constitutional scrutiny of the regulations at issue is barred by the Tenth Amendment[2] is

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[2] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S.C.A. Const. Amend. X (West 1972).

weakly supported. In *State* v. *Rosenthal*, 93 Nev. 36, 559 P.2d 830, *appeal dismissed*, 434 U.S. 803, 98 S.Ct. 32, 54 L.Ed.2d 61 (1977), it was stated that this view was unnecessary to the decision of the case. Other courts have proceeded on the assumption that Congress may regulate gambling insofar as it affects the flow of interstate commerce, as it does here, and in so doing may preempt the power of the states to do the same. *See Marshall* v. *Sawyer*, *supra*, 301 F.2d at 649 n.3 (Pope, J., dissenting). It was not many years ago that Congress had prevented the states from running their own lotteries as they saw fit. *Development of the Law of Gambling, 1776-1976*, *supra*, at 539 *et seq.* The defendants' incantation of the word "gambling" does not prevent the application of federal constitutional standards to the actions of the state.

II. FINDINGS OF FACT

The facts essential to the determination of the motion are as follows:

1. Plaintiff Hotel and Restaurant Employees and Bartenders International Union Local 54 is an unincorporated labor organization within the meaning of § 2(5) of the National Labor Relations Act, as amended, *infra*, representing, *inter alia*, about 8,000 licensed employees of the casinos and casino hotels in Atlantic City, New Jersey, in collective bargaining and other matters affecting employer-employee relations. Plaintiff Frank Gerace is president of Local 54.

2. Frank Gerace is a trustee of the Hotel Employees and Restaurant Employees and Bartenders International

Union Pension Fund, as well as the Hotel Employees and Restaurant Employees and Bartenders International Union Health & Welfare Fund. Local 54, through its officers, participates in the operation of these funds, both of which are employee benefit plans within the meaning of the Employee Retirement Income Security Act of 1974, *infra*. (Plaintiffs' Exhibit 5).

3. Local 54 filed its annual registration statement as required by the Casino Control Act in 1978. On May 12, 1981, the defendant Division of Gaming Enforcement, following its investigation of the applicant, stated its objections to the application. (Plaintiffs' Exhibit 2).

4. The Casino Control Commission thereupon ordered that hearings on the subject of Local 54's registration commence on September 9, 1981. (Affidavit of Frank Gerace, August 17, 1981, ¶2; Defendants' Exhibit 3).

5. Local 54 has posed to the Casino Control Commission certain of its objections to the registration requirement, the conduct of its officers being the subject of a hearing, and to the possibility that the sanctions of § 93 of the Casino Control Act may be imposed. (Plaintiffs' Exhibit 4). The Commission has held that it is without jurisdiction to reach the constitutional objections to § 93. (Plaintiffs' Exhibit 4).

6. The Casino Control Commission has adjourned the hearing scheduled for September 9, 1981, pending determination of the instant motion for preliminary relief. (Defendants' Exhibit 3).

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III. JURISDICTION

[1] Having raised the question of whether the Casino Control Act is preempted by federal statutes regulating commerce, plaintiffs have properly invoked 28 U.S.C.A. § 1331 (West Supp.1981) and 28 U.S.C.A. § 1337 (West Supp.1981) as sources for this court's jurisdiction. *Cab Operating Corp.* v. *City of New York,* 243 F.Supp. 550, 552 (S.D.N.Y.1965). The allegations concerning denial of rights granted by the First and Fourteenth Amendments support our jurisdiction under 28 U.S.C.A. § 1343 (West Supp. 1981).

Defendants argue that we should apply the principle of abstention and decline to exercise our jurisdiction in this case.[3] We are told that under the doctrine of *Younger* v. *Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), we may not interfere with the state's administrative hearings by enjoining them. Additionally, the defendants invoke the doctrine of *Burford* v. *Sun Oil Co.,* 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), and *Alabama Public Service Commission* v. *Southern Railway,* 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (1950). They argue that *Burford* abstention is required because this case presents complex questions of state law which relate to matters of substantial public import, the resolution of which might be disruptive of state efforts to implement a coherent regulatory

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[3] Plaintiffs suggested at oral argument that the abstention issue should not be reached because defendants had filed no motions for dismissal on the grounds of abstention. Such a motion was subsequently filed. Since abstention goes to questions of the court's jurisdiction, we may consider the issue on our own motion. Rule 12(h)(3), Fed.R.Civ.P. The issue was fully briefed and argued by both sides, and deferral of the issue would serve no purpose.

framework. The final ground for abstention is based on the argument that the questions here presented should first be brought to state tribunals, which would then have the opportunity to construe the Casino Control Act in a way which might obviate the necessity for a decision of the federal constitutional questions or substantially modify the constitutional issue. This argument is based on *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). *See generally*, 1A, Pt. 2 Moore's Federal Practice, ¶ 0.203 *et seq.* (2d Ed.1981).

[2] The *Younger* doctrine does not apply to this case. The rule which restricts the federal courts' power to enjoin state proceedings is applicable only to those proceedings which are initiated by the state. *Johnson* v. *Kelly*, 583 F.2d 1242, 1247, 1249 (3rd Cir. 1978); *Bally Manufacturing Corp.* v. *Casino Control Commission*, 534 F.Supp. 1213, 1218-20 (D.N.J.1982); *Santiago* v. *City of Philadelphia*, 435 F.Supp. 136, 145 (E.D.Pa.1977). It is recognized that on this motion the plaintiffs seek to restrain the hearings which were, in fact, scheduled at the instance of the Casino Control Commission. Nevertheless, the entire registration procedure is one which is initiated by the applicant, and it is the validity of the entire procedure which is in question in this case.

[3] Nor is the *Burford* doctrine applicable to this case. This court's recent opinion in *Bally Manufacturing Corp.* v. *Casino Control Commission, supra*, at 1222-23 explained why *Burford* was inapplicable in a similar case. While there are some differences between the procedural postures of that case and the one at hand, it remains true that the questions of state law are neither so technical nor so complex as to require abstention. We do not think that constitutional scrutiny, which inevitably must be applied to

the statute, would so seriously disrupt the functioning of the state's policies as to counsel more delay of that scrutiny than would otherwise be required.

[4] The most forceful arguments counseling abstention emanate from the line of cases beginning with *Pullman, supra.* Our inquiry under *Pullman* is to determine whether the federal issues may be avoided as a result of a state court's construction of the Casino Control Act. To a large extent the decision on whether to abstain depends on the nature of the federal question presented. Where several federal questions are presented, as here, some of the questions may be avoidable and others unavoidable. The court must consider the applicability of the *Pullman* doctrine to each of the federal claims separately, and will discuss the matter more fully in connection with the discussion of the merits of each of the questions presented.

IV. DISCUSSION and CONCLUSIONS OF LAW

To prevail on a motion for preliminary injunctive relief, the moving party must show that it has a reasonable likelihood of eventual success in the litigation, that it will be irreparably injured *pendente lite* if the preliminary relief is not granted, that a balance of equities favors the party seeking preliminary relief, and that the public interest will not be disserved by the issuance of the preliminary injunction. *Constructors Association of Western Pennsylvania* v. *Kreps,* 573 F.2d 811, 814-15 (3rd Cir. 1978), and cases cited therein; *Estate of Presley* v. *Russen,* 513 F.Supp. 1339, 1352-53 (D.N.J.1981). The court will discuss each of the plaintiffs' claims with these standards in mind.

Appendix B

A. *Preemption of the Casino Control Act by Federal Labor Legislation*

The plaintiffs claim that § 93 of the Casino Control Act conflicts with Congressional enactments dealing with labor relations, including those portions of the federal statutes which are intended to guarantee to employees the right to select collective bargaining representatives of their own choosing. The possibility that Local 54 will be prevented from collecting dues and administering pension, health and welfare funds is said to create a direct impediment to effectuation of the rights of self-organization guaranteed to employees by § 7 of the National Labor Relations Act of 1935, *infra*, 29 U.S. C.A. § 157 (West 1973). This section states that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, ...

Id.

[5] The Supremacy Clause of the Constitution, U.S. C.A.Const. Art. VI, cl. 2 (West 1968), provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.* State provisions which conflict with federal laws are without effect. *Hines* v. *Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941). It was recently stated by the Supreme Court that consideration

under the Supremacy Clause must start "with the basic assumption that Congress did not intend to displace state law." *Maryland* v. *Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 516 (1981); see *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Congressional intent to supersede the power of a state to pass a particular regulation may be found, however, where the scheme of federal regulation is so pervasive that there is no room for state regulation in the same field, or where the state regulation may produce a result inconsistent with the objective of the federal statute. *Rice* v. *Santa Fe Elevator Corp.*, *supra*, 331 U.S., at 230, 67 S.Ct., at 1152. A state enactment may be void to the extent that compliance with both the federal and state statutes is impossible or where the statute frustrates Congressional goals. *See generally, Maryland* v. *Louisiana*, *supra*, 451 U.S., at 746-47. Where preemption is the issue, "each case turns on the peculiarities and features of the federal regulatory scheme in question." *City of Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624, 638, 93 S.Ct. 1854, 1862, 36 L.Ed.2d 547 (1973) *citing Hines* v. *Davidowitz*, *supra*, and *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960).

Plaintiffs argue that § 1 of the National Labor Relations Act of 1935 (the "NLRA" or the "Wagner Act"), 49 Stat. 449, as amended 61 Stat. 136, 29 U.S.C.A. § 151 (West 1973), along with § 2 of the Labor-Management Reporting and Disclosure Act of 1959 (the "Landrum-Griffin Act" or the "LMRDA"), 73 Stat. 519, 29 U.S.C.A. § 401 (West 1975), evince a Congressional intention that protection of employees' ability to choose their bargaining representatives be exclusively a federal

concern, not to be interfered with by state enactments such as the one under consideration in this case. These two sections are statements of federal policy which must be considered in determining the preemptive reach of the acts. Section 1 of the Wagner Act states in part:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C.A. § 151 (West 1973). In § 2 of the LMRDA Congress stated:

> The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection. . . .

29 U.S.C.A. § 401(a) (West 1975). Of course, the more substantive portions of these enactments must also be considered.

Section 504 of the Landrum-Griffin Act, 29 U.S.C.A. § 504 (West 1975), operates as a restraint against certain persons from acting as key employees or leaders

of labor organizations, much in the same way as does § 93 of the Casino Control Act, when applied in conjunction with § 86 of the Act. Section 504 bars persons convicted of certain enumerated crimes from serving in such positions for five years following their convictions or the end of their imprisonment unless certain prerequisites relating to pardon or parole have been met. The Casino Control Act lists more crimes than are listed in § 504, and extends the disability to ten years. *See* N.J.Stat.Ann. § 5:12-86c(1), (2), (3), (4) (West Supp.1981). It is argued that the Congressional policy statements quoted above should lead us to conclude that the bars erected by § 504 may only be enforced in the manner provided by the federal enactment. Alternatively, plaintiffs state that even if the states may establish their own mechanisms for enforcing provisions similar to § 504, the enumeration of disabilities in § 504 is exclusive, and may not be extended by state laws such as the Casino Control Act.

The merits of plaintiffs' argument that application of the Casino Control Act to them is barred by the LMRDA, including § 504 and § 1, *supra,* are easily disposed of by reference to *DeVeau* v. *Braisted,* 363 U.S. 144, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960). In that case the Supreme Court considered whether § 8 of the New York Waterfront Commission Act of 1953 was preempted by the NLRA and the Landrum-Griffin Act. The act there examined was enacted pursuant to a bistate compact approved by Congress in 1953 under Article I, § 10 of the Constitution, the Compact Clause. U.S.C.A.Const. Art. I, § 10, cl. 3 (West 1968). It established a system for licensing employees on the waterfront of the Port of New York. *DeVeau* v. *Braisted,*

supra, at 147-51, 80 S.Ct. at 1148-50. Section 8 thereof provided that no person could collect dues from licensed waterfront employees on behalf of any labor organization if any officers or agents of the labor organization had ever been convicted of any felony, unless those officers or agents had been pardoned or paroled. *DeVeau, supra,* at 145, 80 S.Ct. at 1147. Like the Casino Control Act, the legislation under attack in *DeVeau* v. *Braisted* was more comprehensive in its restriction on employees' freedom to choose bargaining representatives than § 504 of the LMRDA. In explaining why the Waterfront Commission Act was not preempted by the LMRDA, the Court, in an opinion by Mr. Justice Frankfurter, stated:

> The fact that Congress itself has . . . imposed the same type of restriction upon employees' freedom to choose bargaining representatives as New York seeks to impose through § 8, namely, disqualification of ex-felons for union office, is surely evidence that Congress does not view such a restriction as incompatible with its labor policies. Appellant, however, argues that any state disablement from holding union office on account of a prior felony conviction, such as § 8, which has terms at variance with § 504(a), is impliedly barred by it. Just the opposite conclusion is indicated by the 1959 Act, which reflects congressional awareness of the problems of pre-emption in the area of labor legislation, and which did not leave the solution of questions of pre-emption to inference. When Congress meant pre-emption to flow from the 1959 Act it expressly so provided. Sections

205(c) and 403, set out in the margin,[2] are express provisions excluding the operation of state law, supplementing provisions for new federal regulation. No such pre-emption provision was provided in connection with § 504(a). That alone is sufficient reason for not deciding that § 504(a) pre-empts § 8 of the Waterfront Commission Act. In addition, two sections of the 1959 Act, both relevant to this case, affirmatively preserve the operation of state laws. That § 504(a) was not to restrict state criminal law enforcement regarding the felonies there enumerated as federal bars to union office is provided by § 604 of the 1959 Act: "Nothing in this Act shall be construed to impair or diminish the authority of any State to enact and enforce general criminal laws with respect to [the same group of serious felonies, with the exception of exclusively federal violation, which are listed in § 504(a)]." And to make the matter conclusive, § 603(a) is an express disclaimer of pre-emption of state laws regulating the responsibilities of union officials, except where such pre-emption is expressly provided in the 1959 Act. Section 603(a) provides: "Except as explicitly provided to the contrary, nothing in this act shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization . . . under the laws of any State. . . ." In view of this explicit and elaborate treatment of pre-emption in the 1959 Act, no inference can possibly arise that § 8 is impliedly pre-empted by § 504(a)

Appendix B

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[2] Section 205(c) provides:

> ". . . No person shall be required by reason of any law of any State to furnish to any officer or agency of such State any information included in a report filed by such person with the Secretary pursuant to the provisions of this title, if a copy of such report, or of the portion thereof containing such information, is furnished to such officer or agency. . . ."

Section 403 provides:

> "No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this title. . . . The remedy provided by this title for challenging an election already conducted shall be exclusive."

Id., at 156-57, 80 S.Ct. at 1152-53.

[6] The opinion of Mr. Justice Brennan is to the very same effect: "[T]he Labor-Management Reporting & Disclosure Act of 1959 explicitly provides that it shall not displace such legislation of the States." *Id.*, at 160-61, 80 S.Ct. at 1154-55. It is to be noted that the Court's analysis of the Waterfront Commission Act's relationship to the LM RDA does not in any way turn on the circumstances that Congress had approved the bistate compact dealing with labor corruption on the piers. The Court considered Congressional approval of the compact only insofar as it may have diminished the preemptive reach of the Wagner Act. *Id.*, at 151-55, 80 S.Ct. at 1150-52. Therefore, plaintiff's argument that *DeVeau* must be confined to situations where Congress has explicitly made exceptions to the asserted preemptive effect of the Landrum-Griffin Act is insupportable. Justice Frankfurter's reading of the history and purpose of the LMRDA has been subject to some criticism,

see DeVeau, supra, at 161-65, 80 S.Ct. at 1155-58 (Douglas, J., dissenting); Note, *State Regulation of Casino Gambling: Constitutional Limitations and Federal Labor Law Preemption,* 49 Fordham L.Rev. 1038, 1053-56 (1981), but it is not subject to question by this court. *Spindel* v. *Spindel,* 283 F.Supp. 797, 802 (E.D.N.Y.1968). We are required to hold that plaintiffs are not likely to succeed on the merits of their claim that the Casino Control Act is preempted by the LMRDA.

Plaintiffs' claim that the Casino Control Act is preempted by the NLRA is considerably more problematic. The starting point for this argument is *Hill* v. *Florida,* 325 U.S. 538, 65 S.Ct. 1373, 89 L.Ed. 1782 (1945). In that case, the Court upheld a challenge to a state law which required each labor union operating in the state to file a written report, accompanied by a filing fee of $1.00, with Florida's Secretary of State listing the names and addresses of its officers. The law further prohibited any person from acting as a business agent for any union unless the person were granted a license by the State. A business agent licensee was required to pay a $1.00 license fee, to show that he was a person of good moral character, and to show that he had not been convicted of a felony. Neither the union nor its business agent had complied with the registration requirement, and they had been enjoined from operating as such by the Florida courts. *Id.,* at 539-41, 65 S.Ct. at 1374.

The Court reversed the decree of the Supreme Court of Florida affirming the lower court's decree granting injunctive relief. It was held:

> The requirement as to the filing of information and the payment of a $1.00 annual fee does not, in

> and of itself, conflict with the Federal Act. But for failure to comply, the union has been enjoined from functioning as a labor union. . . . It is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining.

Id., at 543, 65 S.Ct. at 1375.

This passage reveals that *Hill* v. *Florida* should be considered in light of the unique posture of that case. In our own case, neither the union nor its officers have been enjoined from any of their activities. During the pendency of this litigation, and during the pendency of the hearings which they seek to have enjoined, plaintiffs will continue to represent casino employees and others, operating as they have in the past. The significance of the difference between the situation presented here and the one presented in *Hill* v. *Florida* is borne out by *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 65 S.Ct. 1384, 89 L.Ed. 1725 (1945), decided on the same day as *Hill*. In that case a similar statute was challenged by persons who had neither registered nor been enjoined. The Court declined to rule on the constitutionality of the statute there in question, saying:

> . . . [W]e cannot assume that the failure to file reports will result in the exclusion of petitioners, or any of them, from functioning in the state, or visit any consequences upon them other than the penalty for failure to file. We therefore have no question before us of a statute which has been construed to operate either by its penal sanctions or by the aid of injunction to prevent petitioners, or any of them, from functioning within the state for noncompliance

> with sec. 7 [of the state enactment]. *Compare Hill* v. *Florida*, 325 U.S. 538 [65 S.Ct. 1373, 89 L.Ed. 1782] (1945). Nor can we say in the absence of any showing to the contrary that the filing of information returns will impose such burdens on any of petitioners as to interfere with the performance of their functions under the National Labor Relations Act in cases where that Act is applicable. . . .
>
> We can be asked to condemn a state statute as in conflict with national legislation only if the conflict is clearly shown, *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U.S. 740, 749 [62 S.Ct. 820, 875, 86 L.Ed. 1154] (1942); *Townsend* v. *Yeomans*, 301 U.S. 441, 454 [57 S.Ct. 842, 848, 81 L.Ed. 1210] (1937), and cases cited, and only by those who show that they are adversely affected by the alleged conflict with national power. Each of the contentions which petitioners make with respect to the conflict of sec. 7 and 16 [of the state enactment] with the National Labor Relations Act could readily be adjudicated and disposed of in an adversary suit drawing in question their validity as applied to specific states of fact, in which respondents could both challenge the facts and the applicability to them of the statute.

Id., at 466, 65 S.Ct. at 1392 (citations recast). Our case is similar to *Alabama State Federation of Labor* v. *McAdory*, *supra*, because there is considerable doubt as to whether plaintiffs will ever be enjoined from or otherwise interfered with in carrying out their union functions. The inquiry into the qualifications of the union and its leaders may not be considered to visit irreparable harm on the plaintiffs; something further must befall them before preemption may be found.

It has been held many times that Congressional intent to preempt state laws is not to be readily or incautiously inferred. *E.g., Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware,* 414 U.S. 117, 127, 94 S.Ct. 383, 389, 38 L.Ed.2d 348 (1973). Further, we are not to "seek our conflicts between state and federal regulation where none clearly exists." *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440, 446, 80 S.Ct. 813, 817, 4 L.Ed.2d 852 (1960). *See also Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117, 127, 98 S.Ct. 2207, 2214, 57 L.Ed.2d 91 (1978); *Seagram & Sons, Inc.* v. *Hostetter,* 384 U.S. 35, 45, 86 S.Ct. 1254, 1261, 16 L.Ed.2d 336 (1966). This much is clear from *Alabama State Federation of Labor* v. *McAdory, supra,* as well. There is presently no interference with plaintiffs' ability to function as a labor union or as its president. Nor will there be any such interference during the pendency of the hearing scheduled by the Casino Control Commission. Our examination of the Casino Control Act shows that actual interference with the purposes of the federal enactments is entirely avoidable.

The Commission may find, after a hearing, that the officers of Local 54 meet the qualifications established by § 86, and that the union will not be placed under the restrictions which may be imposed by section 93. Alternatively, the Commission may decide to permit Local 54's agents to collect dues and administer pension funds even though some of Local 54's personnel do not meet the qualifications established by § 86. Section 93 specifically provides:

> The commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require.

N.J.Stat.Ann. § 5:12-93 b (West Supp.1981). It is reasonable to assume that the Commission would exercise the discretion granted by this provision if it were presented with a situation where the imposition of the sanctions provided for in § 93 would create a conflict with federal legislation. Not only is it clear that the Commission may waive the disqualifications of § 86, it is also evident that the Commission may fashion a sanction which is of lesser magnitude than those explicitly provided for in § 93. In *Bally Manufacturing Corp.* v. *Casino Control Commission,* 534 F.Supp. 1213 (D.N.J.1982), this court was presented with a case in which the Casino Control Commission granted a license to a corporation conditioned on severance of all relationships between the corporation and one of its officers. *Id.,* at 1215. The question of whether the Commission might permissibly fashion a similar order after the hearing on Local 54's application is not before us.

With these considerations in mind, it is easy to see how this case falls squarely within the holding of *Seagram & Sons, Inc.* v. *Hostetter,* 384 U.S. 35, 86 S.Ct. 1254, 16 L.Ed. 2d 336 (1966). In that case appellants were challenging the constitutionality of a New York law dealing with the control of liquor prices. Appellants argued that meeting the requirements established by the New York law would have required them to violate federal antitrust laws. The Court rejected this argument, taking note of a section of the New York law which gave the state administrator discretion to modify the requirements complained of. The section provided that liquor could not be sold "except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter. . . ." *Quoted,* 384 U.S., at 46

n.16, 86 S.Ct. at 1261-62 n.16. The Court stated: "We cannot presume that the Authority will not exercise that discretion to alleviate any friction that might result should the [state enactment] chafe against the Robinson-Patman Act or any other federal statute." *Id.*, at 46, 86 S.Ct. at 1261-62. In the face of a similar kind of discretion granted to the Casino Control Commission by § 93 b, we cannot depart from this holding. We are required to presume that the Commission will exercise its discretion appropriately.

Plaintiffs have maintained that there is no room for discretion in this case. They argue that because the selection of collective bargaining agents through elections is an activity protected by § 7 of the Wagner Act, *supra*, the case falls within *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), where it was held:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the NLRA, or constitute an unfair labor practice under § 8, due regard for the federal enactment required that state jurisdiction must yield. . . .

Id., at 244, 79 S.Ct. at 779.

The *Garmon* rule is not pertinent to this motion for two reasons. First, *Garmon* does not overrule *Hill* v. *Florida, supra*, and *Alabama State Federation of Labor, supra*, to the extent that they require a holding of preemption to be based on actual and substantial interference with the federal program by the state. Secondly, this court is convinced that our case falls within the line of cases where a less strict approach to pre-

emption than that in *Garmon* is taken. In *Farmer* v. *United Brotherhood of Carpenters & Joiners of America, Local 25,* 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977), the Court discussed its historical recognition of exceptions to the *Garmon* rule in appropriate cases:

> We have refused to apply the pre-emption doctrine to activity that otherwise would fall within the scope of *Garmon* if that activity "was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we would not infer that Congress had deprived the States of the power to act."

Id., at 296-97, 97 S.Ct. at 1061-62. (citation omitted). See also *Sears, Roebuck & Co.* v. *San Diego District Council of Carpenters,* 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978).

We need not question at this juncture that the regulation of gambling is a matter "deeply rooted in local feeling and responsibility." *Farmer* v. *Carpenters, supra,* 430 U.S. at 296, 97 S.Ct. at 1061. We have already discussed the historical reasons why gambling has been considered anathema in the overwhelming majority of jurisdictions unless it has been subject to strict control. The case of *United States* v. *Dixon,* 25 F.Cas. 872 (C.C.D.C. 1830), discusses extensively the historical background whereby gambling was enjoinable at equity under the doctrine of nuisance. *See generally, The Development of the Law of Gambling: 1776-1976, supra.*

[7] It is important to note that in the cases which have allowed room for regulation of activities "deeply

rooted in local feeling and responsibility," there has always been an analysis of whether the state has tailored its regulations so as to show a due regard for the federal interests in activities sanctioned by the labor legislation. In *Linn* v. *Plant Guard Workers,* 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966), the Court held that a cause of action under state law could be stated for a libelous statement made in the course of an organizational campaign. The Court there adopted the standards set forth in *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), to such libel actions, however, in order to minimize the possibility that the threat of such suits would inhibit free discussion during labor disputes. *Linn* v. *Plant Guard Workers, supra,* 383 U.S. at 64-65, 86 S.Ct. at 665. In *Farmer* v. *Carpenters, supra,* 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 the Court examined whether the state court had minimized the potential for interference with the federal scheme of labor regulation during the course of an action for intentional infliction of emotional distress. It is reasonable to assume that if the Commission is faced with the possibility of sanctioning conduct of the plaintiffs which may have been protected by the National Labor Relations Act or by the LMRDA, it will engage in similar consideration in order to avoid needless friction between the state and federal programs. We are not at liberty to say that they will not do so. Accordingly, we must hold that the plaintiffs' claim of likelihood of success on the merits and irreparable harm *pendente lite* are speculative.

We may not find that there is irreparable harm simply because the hearings might lead to bad publicity about the union and its leaders, as they argue. In the case of *Cab Operating Corp.* v. *City of New York,*

243 F.Supp. 550 (S.D.N.Y.1965), it was held that irreparable harm could be found where a representation election required by a municipal ordinance would interfere with a later federally sanctioned representation election. It was said in that case that the publication of the results of the first election would likely affect the outcome of the second election. It has not been shown that an election involving Local 54 is impending in the immediate future, and we do not decide whether *Cab Operating Corp., supra,* would be applicable here if such an election were so scheduled.

This court's consideration of the public interest and the potentiality of harm to the defendants were a preliminary injunction to be issued leads the court to conclude that the plaintiffs' motion should not be granted on the basis of plaintiffs' claim that the state enactment is preempted by the labor legislation of Congress. It would be better to permit the regulatory mechanism to run its course, with the defendants left to their effort to apply the statute in a constitutionally permissible manner as they see fit.

A word on abstention is appropriate. The central issue of this motion is whether the plaintiffs are subject to the registration and hearing requirements of § 93 of the Casino Control Act. The question of the permissibility of the various sanctions and qualifications which might in the future be applied to the plaintiffs is not squarely at issue. The Casino Control Act clearly states that "[e]ach labor organization . . . *shall* register with the commission annually." N.J.Stat.Ann. § 5:12-93 a (emphasis added). The chances that a state court would interpret this dictate so as to exempt the plaintiffs as a matter of state law from the registration require-

ment appear to be slight or nonexistent. It has not been argued that there is any chance that the state courts might construe the statute so as to avoid the need for this court to decide whether the plaintiffs must be the subject of a hearing. When "the statute is obviously applicable to the plaintiff and his course of conduct or when the statute is not susceptible to a construction that will otherwise avoid the necessity of deciding a constitutional question, a federal court may not properly stay its hand." *United Steelworkers of America, AFL-CIO* v. *Bagwell,* 383 F.2d 492, 495 (4th Cir. 1967) (footnote omitted). For this reason, abstention is inappropriate.

B. *Preemption of the Casino Control Act by the Employee Retirement Income Security Act of 1974*

Plaintiffs' next asserted ground for the issuance of a preliminary injunction is that the Casino Control Act is preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, 29 U.S. C.A. §§ 1001 *et seq.* (West 1975). ERISA was enacted to protect individual pension rights, and to establish a federal scheme for regulation of the private pension system. See H.R.Rep. No. 93-533, 93d Cong., 2d Sess. 1-5, Oct. 2, 1973, *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, 4639-43. It has long been accepted that the establishment and administration of employee benefit plans are partly the responsibility of labor unions. *Inland Steel Company* v. *NLRB,* 170 F.2d 247 (7th Cir. 1948), *cert. denied,* 336 U.S. 960, 69 S.Ct. 887, 93 L. Ed. 1112 (1949). The facts set out, *ante,* indicate that Local 54 and its president, Frank Gerace, are active in the administration of employee benefit plans for the

benefit of members of Local 54. These are benefit plans within the meaning of the definitional section of ERISA. 29 U.S.C.A. § 1002 (West 1975).

Plaintiffs argue that the Casino Control Act is preempted by ERISA because of the potential for interference with the scheme established by ERISA. First, § 93 envisions the removal of plaintiff Gerace from his position as a member of the board of directors of the funds. Second, it is argued that if the union and its agents are prohibited from collecting contributions for the benefit plan, then the plans will be unable to meet their obligations to the people who are entitled to receive benefits therefrom.

The language used by Congress to establish the preemptive effect of ERISA is more comprehenesive than Congress usually employs. Section 514 of ERISA, 29 U.S.C.A. § 1144 (West 1975), provides in relevant part:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter [*i.e.*, 29 U.S.C.A. §§ 1001-1144] . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. . . .
>
> (b)(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.
>
> (c) For the purposes of this section: . . .
>
> (2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, di-

rectly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

Id.

The legislative history of the preemption provisions of ERISA is discussed at some length in *Hewlett-Packard Co.* v. *Barnes*, 425 F.Supp. 1294 (N.D.Cal.1977), *affirmed*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831, 99 S.Ct. 108, 58 L.Ed.2d 125 (1978), and in *Bell* v. *Employee Security Benefit Association*, 437 F.Supp. 382 (D.Kan.1977). These cases indicate that § 514 should be broadly construed. Along with this provision, we must also take note of § 411 of ERISA, 29 U.S.C.A., § 1111 (West 1975), which, similarly to § 504 of the LMRDA, discussed above, prohibits any person convicted or imprisoned from serving as "an administrator, fiduciary, officer, trustee, custodian, agent, or employee of any employee benefit plan," 29 U.S.C. § 1111 (a)(1) (West 1975), for five years after the conviction or imprisonment. ERISA contains no provisions similar to § 603 of the LMRDA, 20 U.S.C.A. § 523 (West 1975), which is quoted in part in the portion of *DeVeau* v. *Braisted* set out *ante*, at pp. 327-328.

Although the language of § 514 of ERISA is broad, we cannot say that it warrants a holding that the application of the Casino Control Act in the case at hand is preempted by ERISA. The language does not call for the courts to invalidate a state law every time its potential application raises the mere spectre of intereference with ERISA's scheme. The outer bounds of the preemptive effect of ERISA have not been determined, *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525, 101 S.Ct. 1895, 1907, 68 L.Ed.2d 402 (1981), nor should they be in the context of this motion. Section 514 does not give us leave to depart

from the well established rules counseling restraint in finding preemption in the absence of a pressing and unavoidable conflict between the state and federal program. *Alessi* v. *Raybestos-Manhattan, Inc., supra,* at 521-22, 101 S.Ct. at 1905-06.

[8] It has already been explained why the discretion which is supplied to the Casino Control Commission by the Act will give the Commission the flexibility required to avoid any conflict with the objectives of Congressional labor legislation. The same considerations dictate the denial of preliminary relief on the basis of plaintiffs' claim that the Casino Control Act is preempted by ERISA.

C. *First Amendment, Vagueness and Overbreadth*

Plaintiffs advance two arguments to support their claim that application of the Casino Control Act to them would violate the First Amendment and the Due Process clause of the Fourteenth Amendment. The first argument deals with the portion of § 93 which may be used to prevent the collection of union dues. It is stated that the application of this provision would restrain the freedom guaranteed to workers to join together in a union and to advance collectively their cause. The second argument is aimed at those portions of § 86 which permit the Casino Control Commission to pass on the quality, nature and purposes of the plaintiffs' associations. It is said that the language of § 86 gives too much discretion to the Commission, is too broadly and vaguely worded to withstand constitutional scrutiny, and thereby inhibits the rights of plaintiffs and others to engage in associational activity protected by the First Amendment. It is further argued that § 86 is so vaguely worded that it fails to give notice of what sort of actions

may be punishable, and for that reason its application would violate due process.

[9-11] We may not abstain on these questions for two reasons. First abstention has been held to be particularly inappropriate where the plaintiff has alleged that the statute sought to be enjoined inhibits the exercise of First Amendment freedoms. *Cameron* v. *Johnson,* 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968); *Zwickler* v. *Koota,* 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); *Dombrowski* v. *Pfister,* 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). These rights, if actually inhibited, are too important to permit any delay and additional cost to be imposed by deferring their vindication to another forum. Secondly, there are cases where the challenge to the statute is so insubstantial that the court may conclude that none of the purposes of *Pullman* abstention would be served by forcing the litigants to settle their claims in state court. In cases where the challenge to the state statute is destined to fail, it is unnecessary to have the state courts set forth their construction of the statute so that the federal constitutional issues might be mooted or presented in a new light. *See International Longshoremen's Association* v. *Waterfront Commission,* 495 F.Supp. 1101, 1114 (S.D. N.Y.1980), *affirmed in part,* 642 F.2d 666 (2nd Cir. 1981). For the reasons explained below, this is such a case.

It has already been stated that the challenge to the statute is at this point a facial one, based on the assertion that §§ 93 and 86 are invalid in their application to labor unions under any circumstances. Were the court presented with a challenge to a specific application of these provisions, the question of whether to abstain might be differently decided. Additionally, our decision not to abtain does not prevent the state courts from construing the

Casino Control Act in as narrow a fashion as they may see fit, *International Longshoremen's Association* v. *Waterfront Commission, supra,* 495 F.Supp. 1101, 1114, or from deciding that the Constitution of New Jersey, *e.g.,* N.J. Stat.Ann.Const. Art. 1, § 6 (liberty of speech) (West 1971); N.J.Stat.Ann.Const. Art 1, § 19 (West 1971) (right to organize and bargain collectively), prevents the Act from being enforceable against labor unions and their members.

[12-14] The First Amendment's protection of freedom of association extends to labor union activities, such as the right to solicit union membership, and to join for the purposes of redress in the grievances of union members. *United Mine Workers of America, District 12* v. *Illinois State Bar Association,* 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed. 2d 426 (1967); *Staub* v. *City of Baxley,* 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958); *Thomas* v. *Collins,* 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945). It is obvious that money is required to enable the effective exercise of First Amendment rights, *e.g., Buckley* v. *Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), and the effective functioning of any union. *Abood* v. *Detroit Board of Education,* 431 U.S. 209, 221, 97 S.Ct. 1782, 1792, 52 L.Ed.2d 261 (1977). The prohibition of collection of dues would be nearly as effective a ban on the union's First Amendment activities as would a more direct prohibition against such activities. *International Longshoremen's Association* v. *Waterfront Commission,* 495 F.Supp. 1101, 1132-33 (S.D. N.Y.1980), *affirmed in part,* 642 F.2d 666 (2nd Cir. 1981); *United Mine Workers of America, District 12, supra,* 389 U.S. 217, 222, 88 S.Ct. 353, 356, 19 L.Ed.2d 426 (1967). The Casino Control Act's grant of power to prohibit the collection of union dues must be subject to the same kind of constitutional scrutiny as a direct ban on the union's activities.

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This case does not involve a prior restraint on the exercise of First Amendment freedoms such as was forbidden in *Hynes* v. *Mayor of Oradell,* 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976) *Shuttlesworth* v. *Birmingham,* 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969), and *Lovell* v. *Griffin,* 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938). The collection of dues which plaintiffs fear may soon be forbidden has continued unencumbered to this day, and will no doubt go on during the pendency of any hearing. It is only after certain findings of fact are made by the Commission that the restraint on dues collection may be imposed. This much has been provided for in § 93. More fundamental to our inquiry is the issue of whether the Casino Control Act grants to the Commission the kind of broad discretion—unbridled by any standards to guide enforcement—which has led to invalidation of state statutes which attempt to subject the exercise of First Amendment activities to licensing requirements. *E.g., Schneider* v. *State,* 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939); *Lovell* v. *Griffin,* 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938). The question of whether there are sufficiently defined standards to guide the Commission in enforcing § 93 involves the questions of overbreadth and vagueness. If § 86 gives insufficient guides for the enforcement of § 93, then the Casino Control Act may not permissibly be applied to prevent the collection of union dues. Therefore, examination of § 86 to determine if it is overbroad or vague is in order.

1. *Overbreadth*

[15] The overbreadth doctrine which plaintiffs seek to have applied on this motion is a rule which permits parties in cases involving challenges to government restric-

tions of First Amendment freedoms to argue that the regulation is invalid because of its effect on the First Amendment rights of others not presently before the court. *Village of Hoffman Estates* v. *Flipside, Inc.*, —— U.S. ——, ——, 102 S.Ct. 1186, 1197, 71 L.Ed.2d 362 (1982) (White, J., concurring); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612-15, 93 S.Ct. 2908, 2915-17, 37 L.Ed.2d 830 (1973). The effort to apply the doctrine is particularly appropriate here, because no sanctions have been applied to plaintiffs for any of their conduct—whether protected by the First Amendment or otherwise. It is only possible for this court to inquire into whether the statute "reaches a substantial amount of constitutionally protected conduct." *Village of Hoffman, supra*, —— U.S. ——, 102 S.Ct. 1186, 1189-90.

[16] The plaintiffs have argued that § 86 permits too broad an inquiry into the associational activities of registrants and applicants for licenses. We may assume for the purposes of this argument, that the First Amendment guarantees to the individual citizen the right to associate for political and social purposes, so long as there is not some showing that the association is for some purpose which endangers the public welfare. *United States* v. *Robel*, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). It has also been held that a governmental inquiry into all of the associations of government workers, without any explicit limitations on how these associations might be weighed in considering the qualifications of the workers, impermissibly inhibits those workers in the exercise of their associational freedoms. *Shelton* v. *Tucker*, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960).

The Casino Control Act does not provide any warrant to the Commission to take the sort of blunderbuss approach condemned in *Shelton* v. *Tucker, supra*. Section 86 does

not call for an inquiry into every political and social association of an applicant. The only sort of association which might lead to disqualification under the Casino Control Act is set forth in § 86 f, which allows sanctions when an applicant has been identified as an "associate of a career offender or a career offender cartel in . . . a manner which creates a reasonable belief that the association is . . . inimical to the policy of this act and to gaming operations." N.J. Stat.Ann. § 5:12-86 f (West Supp.1981). The provision goes on to state that a career offender, roughly, is one who has made an occupation of violating the public policy of the state in a criminal manner for economic gain. *Id.*

Section 86 is aimed primarily at illegal activities for profit. The overbreadth doctrine does not apply to commercial transactions, *Central Hudson Gas & Electric Co.* v. *Public Service Commission,* 447 U.S. 557, 565, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980); *Pittsburgh Press Co.* v. *Human Relations Commission,* 413 U.S. 376, 388, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973), primarily because it is believed that those who profit through the exercise of their First Amendment freedoms need not rely on others to assert their rights vicariously. To the extent that the associations burdened are for the purpose of violating criminal laws, there is no need to question that such associations may be outlawed altogether.

[17] The likelihood that § 86 f will inhibit associational activities other than those just described is minimal. It is not aimed primarily at non-criminal, non-economic associations, and for this reason, we reject plaintiffs' overbreadth claim. The statute does not reach so far into the realm of protected activities as to call for its facial invalidation. *Broadrick* v. *Oklahoma, supra.*

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2. *Vagueness*

[18-20] The final ground asserted by plaintiffs on this motion for preliminary relief is that the statute is impermissibly vague. A statute is void for vagueness when its words fail to "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. . . ." *Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972); *see also United States* v. *Harriss,* 347 U.S. 612, 617, 74 S.Ct. 808, 811, 98 L.Ed. 989 (1954); *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939). When a penal provision is not ". . . sufficiently explicit to inform those who are subject to it, what conduct on their part will render them liable to its penalties, . . ." *Connally* v. *General Construction Company,* 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926), there is a denial of the due process required by the Fourteenth Amendment. *Lanzetta* v. *New Jersey, supra,* 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888. Explicit standards of conduct are also required in order to protect against arbitrary enforcement. *Papachristou, supra.*

The vagueness doctrine was recently expounded in *Village of Hoffman Estates* v. *Flipside, Inc. supra,* —— U.S. at —— - ——, 102 S.Ct. at 1193. There the Court quoted from *Grayned* v. *City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972):

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what

is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis with the attendant dangers of arbitrary and discriminatory applications." (footnotes omitted).

Id.

The Court continued:

These standards should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depend in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject-matter is often more narrow, . . . The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.

Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of

> free speech or of association, a more stringent vagueness test should apply.

Village of Hoffman Estates, supra, —— U.S. at —— - ——, 102 S.Ct. at 1193-94 (footnotes omitted).

These considerations must inform our inquiry into whether the standards enunciated by § 86 are too vague ever to be applied fairly to any citizen.[4] The first consideration is that the allegedly vague portions of § 86 are aimed primarily at economic activities. This is clear from our overbreadth analysis of § 86 f, which is similar to the challenged portions of § 86 e. Secondly, the penalties which the Act imposes are civil rather than criminal.

[21] Before turning to the other considerations enumerated in *Village of Hoffman Estates, supra,* we note that §§ 86 e and 86 f provide that activities may provide grounds for sanctions only if they create a "reasonable belief" that the conduct in question would reflect poorly on the applicant's qualifications for licensure. *Id.* Our attention has been drawn to the Commission's opinion in the matter of the *Application of Resorts International Hotel, Inc. for a Casino License,* Docket No. 79-CL-1 (undated) (Defendants' Exhibit 6), from which it is clear that the actions of an applicant are judged by the ethical and legal standards which were prevailing at the time and place of the actions in question.

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[4] The Court stated in *Village of Hoffman Estates* that to succeed on a vagueness claim, ". . . the complainant must demonstrate that the law is impermissibly vague in *all* of its applications." *Id.,* —— U.S. at ——, 102 S. Ct. at 1191 (emphasis supplied).

Id., at 34, 43, 53, 84.[5] This interpretation of § 86 is consistent with "reasonable belief" requirement, inasmuch as it establishes an objective standard for judging an applicant's actions. With the case at bar, we may compare *Coates* v. *City of Cincinnati*, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971), where the Court declared that an ordinance could not constitutionally proscribe conduct "annoying to persons passing by." It was held that the "annoying" standard could not be fairly applied because, "Conduct that annoys some people does not annoy others." *Id.*, at 614, 91 S.Ct. at 1688. This subjective standard differs greatly from the objective standard which is preserved here.

The application of the objective standard serves many of the same purposes as would a scienter requirement, in that it includes an element of notice to the potential applicant. Conduct which a reasonable person does not expect to provide grounds for suspicion, and which does not violate contemporary legal and ethical standards, would not likely result in disqualification for that person. The objective standard also minimizes the opportunities for arbitrary enforcement, one of the most important problems with laws which have been found vague. Further, the provision requiring the Commission to prepare specific findings of fact and to state the reasons for denying any applications also reduces the danger that there will be arbitrary enforcement. N.J. Stat.Ann. § 5:12-94 c (West Supp.1981).

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[5] In determining the meaning of the Casino Control Act, this court should consider the interpretation of the statute given by those charged with enforcing it. *Grayned* v. *City of Rockford*, 408 U.S. 104, 110, 92 S. Ct. 2294, 2300, 33 L. Ed. 2d 222 (1972).

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The most crucial question raised in deciding whether a statute is impermissibly vague is whether it inhibits the exercise of First Amendment freedoms. It has already been indicated in our analysis of the overbreadth issue that the Casino Control Act it not aimed substantially at protected associations.

In view of all of these considerations, the court concludes that plaintiffs are not likely to succeed on the merits of their vagueness claim. Nor are they likely to succeed on the merits of their related overbreadth and First Amendment claims. The absence of any irreparable harm *pendente lite* has already been discussed in connection with the discussion of plaintiffs' preemption claims, as has the conclusion that the balance of equities and the public interest weigh against the issuance of a preliminary injunction.

V. CONCLUSION

For the reasons set forth herein, an order denying plaintiffs' application for a preliminary injunction will be entered.

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ON MOTION FOR TEMPORARY INJUNCTION PENDING APPEAL

Hotel and Restaurant Employees and Bartenders International Union Local 54 (hereinafter "Local 54"), and its president, Frank Gerace, filed this action seeking a declaration that certain provisions of New Jersey's Casino Control Act, L.1977, c. 110, § 1 *et seq.*, as amended by L.1978, c. 7, § 1 *et seq.*, N.J.Stat.Ann. § 5:12-1 *et seq.* (West Supp. 1981), may not constitutionally be enforced against them. Plaintiffs also seek relief in the form of damages and an injunction. Plaintiffs have invoked 28 U.S.C.A. §§ 1331, 1337, 1343 (West Supp.1981) as sources of this court's jurisdiction. Plaintiffs sought to have this court enjoin hearings scheduled by the defendant Casino Control Commission *pendente lite*, and the court denied plaintiffs' motion for preliminary injunction on March 22, 1982. (*See* Opinion and Order, March 22, 1982).

The matter is currently before the court on the motion of plaintiffs for a temporary injunction pending appeal, which the court has authority to grant under Rule 62(c), Fed.R.Civ.P. That rule reads in part: "When an appeal is taken from an interlocutory or final judgment granting, dissolving or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms . . . as it considers proper for the security of the rights of the adverse party." *Id.* Plaintiffs have filed a notice of appeal from the decision of March 22, 1982, purportedly under the provisions of 28 U.S.C.A. § 1292(a) (West 1966). The court has been informed that the defendant Casino Control Commission has scheduled hearings pursuant to § 93 of the Casino Control Act. N.J.Stat.Ann. 5:12-93 (West Supp. 1981), to begin on April 26, 1982.

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[22] On a motion for an injunction authorized by Rule 62, Fed.R.Civ.P., it is well established that the court must evaluate the extent to which the moving party has made a showing as to the following four factors:

(1) the likelihood of the moving party's success on the merits of its appeal;

(2) the likelihood of irreparable injury to the moving party if the injunction is denied;

(3) the extent to which the opposing parties will be harmed if the injunction sought is issued; and

(4) the likelihood that there will be no substantial harm to the public interest if the injunction sought is issued.

Long v. *Robinson*, 432 F.2d 977 (4th Cir. 1970); *Philadelphia Council of Neighborhood Organizations* v. *Adams*, 451 F.Supp. 114 (E.D.Pa.1978); *Evans* v. *Buchanan*, 435 F. Supp. 832 (D.Del.1977); *Resident Advisory Board* v. *Rizzo*, 429 F.Supp. 222 (E.D.Pa.1977). Of course, no single factor is controlling, and the court must balance the strength of the plaintiffs' showing on each of these four factors as part of its exericse of discretion in considering the motion. *Phila. Council of Neighborhood Organizations, supra*, 451 F.Supp., at 116, citing, *Evans* v. *Buchanan*, 424 F.Supp. 875, 879 (D.Del.1976). The court will discuss each of these four factors below.

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I. LIKELIHOOD OF SUCCESS ON THE MERITS OF THE APPEAL

Plaintiffs have not filed a motion for reconsideration, nor have they treated the instant motion as one. It has been recognized that there is an almost insurmountable burden in requiring a party to satisfy a court that its decision on a matter which it has considered extensively was erroneous. Yet, this is what is required if a party is to show the court that it is likely to succeed on appeal. *See Evans* v. *Buchanan*, 435 F.Supp. 832, 835, 843 (D.Del.1977). The court does not take plaintiffs' efforts to show this court that it was in error as an affront. Nevertheless, the court feels that the arguments are best left unanswered when the other factors which the court is required to consider can determine the outcome of the motion. Plaintiffs stated at oral argument that the posture of the instant case is different from that of a case on which the court is said to have placed "primary reliance." The court feels that the opinion of March 22 should speak for itself, and that it should not indulge in discussions of which precedents were more persuasive than others if such discussion is not necessary. For this reason, the court will turn to the other factors which plaintiffs are required to show.

II. IRREPARABLE HARM

The court is not satisfied that plaintiffs will suffer irreparable harm during the pendency of the appeal if the Casino Control Commission's hearings are not enjoined. Plaintiff argues that the publicity which will likely result from the hearings which are scheduled to begin on April 26 will have an impact on the elections scheduled for June,

1982, in which the members of plaintiff Local 54 will choose their leaders. Reference by plaintiffs is made to page 332 of the opinion of March 22, where it was stated:

> We may not find that there is irreparable harm simply because the hearings might lead to bad publicity about the union and its leaders, as they argue. In the case of *Cab Operating Corp.* v. *City of New York*, 243 F.Supp. 550 (S.D.N.Y.1965), it was held that irreparable harm could be found where a representation election required by a municipal ordinance would interfere with a later federally sanctioned representation election. It was said in that case that the publication of the results of the first election would likely affect the outcome of the second election. It has not been shown that an election involving Local 54 is impending in the immediate future, and we do not decide whether *Cab Operating Corp., supra*, would be applicable here if such an election were so scheduled.

In *Cab Operating Corp., supra*, the court enjoined the release of the results of a municipally sanctioned election for union representation where a federally sanctioned election was likely to follow closely on its heels under different conditions and rules. It was held that these circumstances brought the case within those which prohibited ". . . activities of officers or bodies purporting to act under the sanction of state or local law to coerce parties to a controversy or to force its resolution through the pressure of molded public opinion in derogation of federally granted rights." *Id.*, at 556 (citations omitted). It is clear that the Casino Control Commission's hearings do not rise to the level of direct interference with federally sanctioned activities which was present in the *Cab Operating Corp.* case.

Nor do the state's activities sink to the nadir of illegitimacy which the court faced in that case. Publicity about union activities is a product of a free and vigorous press, and so long as it is not engineered by state action for the purpose of undermining federally sanctioned activities, the court is not free to interfere.

Plaintiffs also assert that irreparable harm will befall them if an injunction is not entered because certain of the issues which they raised in their motion for a preliminary injunction may be mooted during the pendency of their appeal. In their brief, at page 9, it is stated:

> This entire case and the issues on Appeal revolve around proposed state activity which is now threatened to occur in its entirety pending appeal. There can be little doubt that the Commission hearings will be held in full before the merits of the Plaintiffs' Appeal are finally determined by the Third Circuit. Given that the focus of the Plaintiffs' Appeal is to obtain an injunction of the Commission hearings, if the hearings are allowed to run their course pending Appeal, the practical import of the relief sought by the Plaintiffs will be mooted. If the Plaintiffs are victorious on Appeal, such a victory will be academic. Accordingly, for this reason it is further appropriate to grant interim relief. *J. Weingarten, Inc.* v. *Potter,* 233 F.Supp. 833 (S.D.Tex. 1964).

Plaintiffs have informed this court that they have moved or will soon move for an expedited determination of their appeal. The question of whether the appeal may be determined before the Casino Control Commission takes any action which might render moot some of the issues raised

by plaintiffs is solely within the control of the appellate panel. Any determination of this question by this court would be based on nothing more than mere speculation.

III. HARM TO THE DEFENDANTS AND TO THE PUBLIC INTEREST

This court is required to consider the extent to which an injunction might harm the interests of the defendants and of the public. Consideration of these factors on the motion for a preliminary injunction led this court to the conclusion that the state's regulatory mechanism should be allowed "to run its course, with the defendants left to their effort to apply the statute in a constitutionally permissible manner as they see fit." Opinion of March 22, at page 332. The court is reaching the same conclusion on the instant motion.

IV. CONCLUSION

For the reasons stated above, the plaintiffs' motion for an injunction pending appeal will be denied. The court will enter an appropriate order.

APPENDIX C

Order of United States District Court for the District of New Jersey

UNITED STATES DISTRICT COURT

for the District of New Jersey

Civ. A. No. 81-2630

October 1, 1982

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54, *et al.*

v.

MARTIN DANZINGER, *et al.*

ORDER

Upon motion made and for good cause shown, it is hereby ordered and decreed that Defendants, Division of Gaming Enforcement and Casino Control Commission are hereby enjoined pending appeal from taking any steps to enforce Section 93 of the New Jersey Casino Control Act against Plaintiff, Hotel and Restaurant Employees and Bartenders International Union Local 54, its officers, agents, employees and members. Defendants are further

enjoined pending appeal from taking any steps to enforce the decision rendered by the Commission in that matter docketed as *In Re the Registration of Hotel and Restaurant Employees and Bartenders International Union Local 54,* 81-LO-1, entered September 28, 1982;

Provided, defendants are not enjoined from rendering an opinion and order respecting the interpretation of § 93(b) of the Casino Control Act with respect to administration of pension and welfare funds.

STANLEY S. BROTMAN
United Sstates District Judge

Dated: October 1, 1982

Original Filed
October 1, 1982
Allyn Z. Lite, Clerk

APPENDIX D

Opinion of New Jersey Casino Control Commission

STATE OF NEW JERSEY
CASINO CONTROL COMMISSION

Docket No. 81-LO-1

September 28, 1982

In the Matter of

THE HOTEL AND RESTAURANT EMPOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54

NEW JERSEY CASINO CONTROL COMMISSION:

Don M. Thomas, Acting Chairman
Martin B. Danziger, Commissioner
Joel R. Jacobson, Commissioner
Madeline H. McWhinney, Commissioner
Carl Zeitz, Commissioner

APPEARANCES:

For the Casino Control Commission:
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Timothy J. O'Neill, Assistant Counsel

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On May 11, 1981, the Division of Gaming Enforcement (Division) filed a letter report with this Commission in which it alleged that three officials of Hotel and Restaurant Workers and Bartenders International Union Local 54 were disqualified under section 86 of the Casino Control Act, N.J.S.A. 5:12-86. The Division therefore urged the Commission to impose the sanctions provided by section 93 of the Act, N.J.S.A. 5:12-93, against Local 54. The Commission scheduled a hearing. Local 54 then filed suit in the Federal District Court for the District of New Jersey seeking, *inter alia*, to enjoin the enforcement of sections 86 and 93 of the Act against it. *See, Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danzinger* (sic), *et al.*, 536 F. Supp. 317 (D. N. J. 1982). At the request of the Court the Commission adjourned the hearing pending disposition of

Local 54's motion for a preliminary injunction. Following the denial of that motion, the hearing before the Commission was again scheduled. On April 30, 1982, prior to the commencement of the hearing, the Division filed a second letter report in which it cited two additional employees of Local 54 as suffering from section 86 disqualification and again urged that the section 93 sanctions be imposed against the Union. The Commission thereafter held the hearing, during which it considered the issues raised in both the May 11, 1981, and April 30, 1982, letter reports.

Before proceeding to the resolution of those issues, we will briefly describe the statutory provisions involved. Section 93 of the Act provides that a labor union which seeks to represent persons licensed or registered under the Act and employed at a casino hotel must register annually with the Commission. N.J.S.A. 5:12-93(a). Local 54 represents approximately 14,000 waiters, kitchen workers, bartenders, porters and other hotel workers, the large majority of whom are employed in the casino hotels in Atlantic City and are licensed by or registered with the Commission. Thus, the Union is required to register under section 93, and it has done so.

Section 93 also empowers the Commission to preclude any union which is required to register from receiving dues from any persons licensed or registered under the Act and employed in a casino hotel, and from administering pension or welfare funds, if any officer, agent or principal employee of the union is disqualified under section 86, unless the Commission waives the disqualification "consistent with the public policy of this act and upon a finding that the interests of justice so require." N.J.S.A. 5:12-93(b).

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Section 86 of the Act enumerates various disqalifying criteria, which apply not only to officers, agents and principal employees of labor unions, but also to all persons who must be licensed or registered in connection with the ownership, financing, management and operation of casinos and casino hotels. Only two of the section 86 criteria are relevant to the present case. Section 86(c) disqualifies persons convicted of certain enumerated crimes under New Jersey law or of any equivalent offenses in any other jurisdiction. N.J.S.A. 5:12-86(c). Section 86(f) provides for the disqualification of any person who is "an associate of a career offender or a member of a career offender cartel in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this act and to gaming operations." N.J. S.A. 5:12-86(f). This section defines a career offender as "any person whose behavior is pursued in an occpational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this state," and defines a career offender cartel as "any group of persons who operate together as career offenders."

In its initial letter report of May 11, 1981, the Division alleged that Local 54's secretary-treasurer, Robert Lumio, and a member of its Executive Board, Frank Materio, were disqualified under section 86(c) by reason of criminal convictions, and that Lumio, Materio and the Union's president, Frank Gerace, were disqualified under section 86(f) by reason of their association with certain career offenders or career offender cartel members. Robert Lumio died prior to the hearing before the Commission, and thus his qualifications were no longer in issue. During the hearing it was established that

the statute under which Frank Materio was convicted was later declared unconstitutional and that he had been granted a presidential pardon. The Commission therefore ruled that it would not find Materio disqualified under section 86(c) based on this conviction.

Thus, with respect to Gerace and Materio, the questions which remain for consideration are (1) whether they are associated with a career offender or a career offender cartel member, and, if so, (2) whether the association is of such a nature as to create a reasonable belief that it is inimical to the policy of the Act and to gaming operations.

In its second letter report, dated April 30, 1982, the Division alleged that two Union employees, Eli Kirkland and Karlos LaSane, had been convicted of crimes enumerated in section 86(c). During their testimony Kirkland and LaSane described themselves as "business agents" and "organizers" for the Union (T248; T287; D1; D8), and the Union contended that they are not officers, agents or principal employees within the meaning of section 93. Kirkland and LaSane admitted to their convictions, and certified copies of the convictions were accepted into evidence. It is clear that some of the crimes involved are among those enumerated in section 86(c). However, the Union urged the Commission to waive the section 86(c) disqualification of Kirkland and LaSane and presented evidence of their rehabilitation and of their value to the Union's membership and the community at large. Thus, with respect to these individuals, the issues before us are (1) whether they are officers, agents or principal employees of Local 54, and, if so, (2) whether the Commission should waive their section 86(c) disqualification consistent with

the policy of the Act and in the interests of justice as permitted by section 93(b).

Prior to the hearing the Commission ruled that the burden of proof of section 86 disqualification was on the Division. The quantum of proof required is a preponderance of the evidence. *In the Matter of the Application of Resorts International for a Casino License,* Docket No. 79-CL-1 (1979), at 12. In determining whether the Division has met its burden we will first deal with the evidence against Gerace and Materio and then turn our attention to Kirkland and LaSane.

GERACE AND MATERIO

I. ORGANIZED CRIME

The Division alleges that Gerace and Materio are associated with career offenders or members of a career offender cartel, and thus it has the burden of establishing the identity of the career offenders and the existence of a career offender cartel.

The Division presented extensive evidence designed to prove that certain persons are career offenders or career offender cartel members. Counsel for Local 54 and Gerace, who was separately represented, repeatedly indicated that they had no intention of litigating the point (*see, e.g.,* T455; Brief at 15).[1] However, during summations counsel for Local 54 questioned whether the

[1] T refers to the transcript. D refers to the Division's exhibits. R refers to Local 54's exhibits. C refers to the Commission's exhibits.

Division had met its burden on this threshold issue (T2464). We find that it has.

There was substantial evidence adduced during the course of the hearing regarding the existence and structure of organized crime in the Philadelphia metropolitan area and the southern portion of New Jersey, including Atlantic City. Much of this evidence was introduced through the testimony of John Tamm and James Maher, special agents with the Federal Bureau of Investigation, and Gino Lazzari, an agent with the Pennsylvania Crime Commission, all of whom have extensive experience in investigating organized crime (T429; 1002-1003; 1268). They indicated that their familiarity with the structure of organized crime and the individuals involved therein was based upon their own investigations, intra-agency communications, contacts with other law enforcement agencies, conversations with confidential informants, authorized wiretaps and discussions with purported members of organized crime (T440; 462; 481; 1003; 1014).

These witnesses described an organization of men who routinely engage in a variety of illegal activities including gambling, loansharking, labor racketeering, extortion, murder, arson, pornography and narcotics trafficking (T430; 452; 1015).

This organization is referred to by its members as La Cosa Nostra which, roughly translated, means "this thing of ours" (T429). La Cosa Nostra consists of a number of groups commonly called "families," which are generally identified by the name of a significant figure in that family (T451). Generally, each family limits its activities to a particular geographic area (T 442). Furthermore, each family adheres to a basic hier-

archical structure. The boss is the head of the family (1006), and the underboss is the second in command (T449; 1007). The consiglieri or counsellor advises the boss and assists him in resolving intra-family disputes (T449; 1007; D54, at 62-64). Beneath the family leadership are units known a regimes which are headed by a capo (T450; 1007). Each regime consists of initiated members of the organization called soldiers (T450; 1007).

The primary family which operates in the Philadelphia-South Jersey area is known as the Bruno family, so named for Angelo Bruno, who reputedly headed the family for a number of years until he was murdered in March 1980 (T449; 451; D15). Following Bruno's death it was reported that his underboss, Philip Testa, assumed control of the family (T1027; D18; D54, at 34). Testa had a lengthy criminal record (D18). He was killed in a bomb blast in March 1981 (T1028).

Agents Tamm (T544) and Lazzari (T1028) testified that Nicodemo Scarfo now heads the Bruno family (*see also,* R8, at 37-38). Scarfo has a lengthy history of criminal involvement. In March 1950, he pled guilty to setting up an illegal lottery and conspiracy (D97). In Febrary 1964, he pled guilty to involuntary manslaughter after being charged with murder (D96). In June 1971, he was held in contempt for refusing to testify before the New Jersey State Commission of Investigation and was committed to Yardville Correction Center (D92). In July 1976, he was incarcerated for refusing to answer questions before a State grand jury investigating allegations of obstruction of justice in a criminal prosecution (D93). Lastly, he was convicted of possession of a firearm by a convicted felon in 1981 (D95). In sentencing Scarfo to prision for two years for this last conviction, the court concluded:

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"Mr. Scarfo is surrounded by violence" (D60, at 92, part 2).

There was evidence presented during the hearing of Scarfo's recent involvement in both loansharking and illegal gambling endeavors (T487-88; D14; D60, at 38-42 first part).

On November 4, 1977, the FBI, using a court-authorized wiretap, recorded a conversation as the Tyrone Denittis Talent Agency among Nicodemo Scarfo, Philip Testa, Harry Riccobene and Frank Narducci (T534; D54). Both Riccobene and Narducci have extensive criminal records (D21; D43) and are alleged to have been associates of Scarfo and Testa (T515; 1039). During the recorded conversation the participants referred repeatedly to "La Cosa Nostra" (D54, at 56), "boss" (D54, at 40, 43, 54), "underboss" (D54, at 34) and "consiglieri" (D54, at 35, 36, 62), and clearly indicated that they are members of the Bruno crime family.

Scarfo further evidenced his criminal nature by attempting to recruit members for his criminal group. Joseph Salerno testified to Scarfo's efforts to persuade him to become "a gangster" (T678). Salerno is presently participating in the federal witness protection program and his testimony will be discussed at considerable length below.

In December 1979, a telephone list was seized from Scarfo following his arrest for the murder of Vincent Falcone (T906-08). This list contained the telephone numbers of numerous individuals who have criminal records and have been associated with organized criminal activity (D9; D16), including Ralph Puppo (T505-506, 1029; D60, at 45-46, first part), Philip Testa (D18;

D19; D109), Lawrence Merlino (T1030), Salvatore Merlino (T1028; D59, at 15), Alfred Iezzi (A1030; D58, at 44), Nicholas Russo (T1031), Frank Narducci (T1032; D20; D21), Anthony Ferrante (D24; D25), Antonio Caponigro (T525; D31; D32; D59, at 45), Ralph Napoli (T 522-523; 1033; D29), Anthony Casella (T1035; D58, at 45), Frank Monti (A1035; D40; D58, at 48), Salvatore Testa (T1036), Salvatore Profaci (D48), Lawrence Centore (D51; D60, at 100, first part), Louis Pacella (T 527; D50) and Frank Serpico (T530; D49).

We find that Scarfo is a career offender and an active member of a career offender cartel.

Numerous other individuals were identified as being members of La Cosa Nostra or associates of Scarfo during the course of the hearing. However, we will focus specifically on only four of these men as relevant to the matter at hand.

Nicholas Virgilio has been twice convicted of murder (D117-120), and has been identified as a member of the Philadelphia-based crime family (T1039). He is a close associate of Scarfo (T943; 1225). We find that Virgilio is a career offender and a member of a career offender cartel.

Philip Leonetti who is Scarfo's nephew, was identified as a member of this crime syndicate (T676-7; 1041-42). Leonetti and Vincent Bancheri are partners in a concrete business called Scarf, Inc. (D121). Joseph Salerno testified that he was told by Bancheri that "Nick Scarfo was really the boss, but they couldn't have him in the corporation" (T667). The Scarf, Inc. office is located at 28 North Georgia Avenue, Atlantic City which adjoins 26 North Georgia Avenue, the residence of Scarfo (T675-6; D64).

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Leonetti's criminal record consists of several arrests, two of which were for murder, and a single conviction for a disorderly persons offense in 1975 (D47). Salerno testified, and we find, that Leonetti arranged a usurious loan to him using assets derived from Scarfo (T487-88; D14; D60, at 38-42 first part). We find that Philip Leonetti is closely associated with Scarfo and has engaged with him in a criminal enterprise.

Salvatore Merlino reportedly holds the position of underboss in the Bruno-Scarfo crime family (T1028). According to Salerno, Salvatore Merlino has assisted Scarfo in his illegal gambling operation (T487-488; D14; D60, at 38-42). Lawrence Merlino has been identified as an initiated member of La Cosa Nostra and a close associate of Scarfo (T700-701; 710; 949; 976; 1043). We find it unnecessary to make specific findings with regard to the Merlinos' status as career offenders or as members of a career offender cartel, although their names will come up again in this opinion.

We now turn to the more difficult issue—whether the Division has proven that Gerace and Materio are associated with a career offender or a career offender cartel member "in such a manner which creates a reasonable belief that the association is inimical to the policy of [the] act and to gaming operations" N.J.S.A. 5[redacted]6(f). In this respect the hearing focused on the relationships of Gerace and Materio to Scarfo. We now turn to the evidence concerning the existence and nature of their relationships.

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II. RELATIONSHIP OF GERACE AND MATERIO TO SCARFO

The evidence presented by the Division on this issue is diverse and does not lend itself to neat categorization, which is understandable considering the nature of the issue. We must consider each of the areas raised by the Division and the evidence adduced by all the parties to determine whether the Division has proven a section 86(f) disqualification of Gerace and Materio. We will begin with two pieces of documentary evidence taken from Scarfo when he was arrested for murder on December 23, 1979.

On December 16, 1979, Vincent Falcone was murdered. Scarfo, Leonetti and Lawrence Merlino were arrested and charged with the murder. They were tried and found not guilty.

As previously noted, at the time of Scarfo's arrest a telephone list (D16) was taken from his person (T906). A duplicate thereof was taken from a dresser drawer in his apartment at 26-28 North Georgia Avenue (T908).

Law enforcement officials determined that many of the names on the list were aliases and many of the telephone numbers were in code. After deciphering the code they determined that generally, but not invariably, the coded numbers related to associates of Scarfo or of organized crime or of organizations associated with Scarfo. Many of the uncoded numbers related to reputable persons, such as dentists and lawyers, not deemed to be associates of Scarfo (T920-922; 974; D9; D10).

There were five persons on the list who are or were employed by Local 54. Frank Gerace was listed under the name "Percy" and his telephone number was in code. Frank

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Materio was listed by his proper name and his business and home numbers were listed in an uncoded fashion. Robert Lumio, who served as secretary-treasurer of Local 54 from September 1979 until his death in June 1981, was listed as "Bob L," with an uncoded number. Frank Lentino, a business agent for Local 54 (T1665) and, since June 1981, office manager of its Camden office, was listed as "Frank Gray," with coded phone numbers for his home and a Teamsters local for which he once worked. Susan Holland, the branch manager of William L. Meyers, Inc., administrator of the health and welfare funds for Local 54, and a "collector" for the Local's severance fund (T324; 1732; 1904), was listed as "Percy girl," with a coded number. In addition, Gerace's mother, who also lives at 26-28 North Georgia Avenue, was listed as "Percy Mom," with a coded number.

It can be inferred that the persons on the list are those who Scarfo had occasion to speak with or anticipated that he might have occasion to speak with on the telephone. In view of the constant attention he receives from the police, it can further be inferred that he kept certain numbers in code because he did not want evidence of his association with those persons to fall into the hands of the authorities. The appearance of five Local 54 employees on the list is evidence of Scarfo's interest in the Union and access to its leaders, and his encoding of the Gerace and Holland entries evidences a desire to mask his association wtih them.

The other document in question is another piece of paper taken from Scarfo's dresser drawer after his arrest for the Falcone murder (D62). The writing on this paper is less than clear, but, according to the Division and according to our own reading of the exhibit, it contains the words: "KIS — POTS — GON ALL OUT BACK TO 54 ST. BE-

FORE FEB" (T936). The Division alleges that the note refers to Thomas Kissick, Ernest Potts and Thomas "Goony" Walsh, and their removal as union officials when Local 491 merged with Local 54 in September 1980.

Thomas Kissick was the head of Local 491, a bartenders local which originally merged into Local 54 (T1824) sometime around 1975 (RA, at 37). Thereafter Kissick became secretary-treasurer of Local 54 (T27). According to Warren Borish, an attorney for Local 54, as casinos became a possibility in Atlantic City Kissick petitioned the International Union to again split local 491 from Local 54 so that he could again have his own bartenders union (T1824), and in August 1979 Local 491 was in fact split from Local 54 (T1825; R8, at 42).

Kissick was appointed acting president (R8, at 42) or acting secretary-treasurer (T937) of the new Local 491. The International appointed Ernest Potts, an International trustee, and Thomas "Goony" Walsh, an International organizer, to run the day-to-day affairs of the Local (T927; 1825; 1859-1860; R8, at 42). The International also directed the creation of a joint board to oversee 491 and 54 and Gerace became the chief executive officer of that joint board (T1825-1826).

In September 1980, after one year in existence, 491 again merged into 54. According to Borish, this merger resulted from 491's inability to survive on the dues it was collecting and the desire of the International to avoid having to register under section 93 of the Casino Control Act as a result the existence of the joint board (T1826-1827). At any rate, as a consequence of the merger, Kissick, Potts and Walsh were out of their union jobs (T937).

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We find that the words on D62 refer to the ouster of Kissick, Potts and Walsh from their union positions when 491 remerged with 54. It is true that there is no indication what the letters "st." on the paper mean, and that the paper says "before feb." and the remerger and consequent removal of Kissick, Potts and Walsh did not occur until September 1980. However, the words on the paper are sufficiently clear to support the interpretation given by the Division. The fact that Scarfo had the paper in his possession indicates that he has an interest in the affairs of these unions and in keeping up to date on who is running them, and that he was supplied with advance notice of the merger of 491 and 54.

During the hearing the Division attempted to obtain a handwriting exemplar from Scarfo in order to determine if D62 is written in his hand. The Commission ordered Scarfo to produce the exemplar, and upon his failure to do so certified to the Superior Court facts underlying his contempt of the Commission. *See,* N.J.S.A. 5:12-107(c). However, we do not think it is of particular importance whether the words on the paper are in Scarfo's handwriting. The significant fact is that he had the paper in his possession.

The events surrounding the Falcone murder arrests yield still further evidence of the relationship of Gerace and Materio to Scarfo and his associates. Shortly after their arrest, Scarfo, Leonetti and Merlino were released on $92,000 cash bail (T1158). The bail was supplied by Toro Construction Company ($45,000), Scarf, Inc. ($20,000), Catherine Scarfo, Scarfo's mother and a resident at and the owner of 26-28 North Georgia Avenue ($7,000), and Lillian Gerace, Gerace's mother and another resident at 26-28 North Georgia Avenue ($20,000) (D68).

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The Division presented documentary evidence establishing that half of Lillian Gerace's contribution to the bail was supplied by Frank Gerace.

On December 28, 1979, Gerace withdrew $10,000 from his $18,316.74 savings account (D69) and transferred it to his checking account (D70). On the same day he wrote a $10,000 check to Lillian Gerace (D71; D72), and she obtained a $10,000 treasurer's check payable to Catherine Scarfo (D73), thus completing the transfer of $10,000 from Frank Gerace's savings account to the $92,000 bail pool (T1197-1206; 1890).

Shortly after Scarfo, Leonetti and Merlino were released on the cash bail Frank Materio put up his house as property bail for Leonetti and Merlino in order that part of the cash bail could be released (T1608; D68). Despite having done so, Materio testified before the Commission that he knew Leonetti only by sight and had never spoken to him, and that he did not know Merlino (T1605; 1626).

Materio did admit that he had a relationship with Scarfo. He said that he had met Scarfo in a bar approximately 25 years ago (T1604), but had only seen him six or seven times in the prior five years (T1604), had never spoken to him on the phone, and had no idea why he was on his telephone list (T1612). Materio also testified that he knew Catherine Scarfo and that occasionally he had played cards with Nicodemo's late father, Dan (T1648).

Materio claimed that Lumio approached him on behalf of Catherine Scarfo and he agreed to use his home as bail as a favor to her (T1628), despite the fact that it is his only real property (T1627) and despite

the further fact that his wife was "dead against it" (T1744).

We find Materio's explanation unconvincing. We cannot believe that he would put up his house, over objection of his wife, as bail for people he barely knew. Even if he thought he was putting up bail for Scarfo, or as a favor to Catherine Scarfo, we cannot believe he would do so if his relationship with these people was as casual as he claims. In the ordinary course a person would not put up his house, or $10,000 of the $18,000 in his savings account, as bail unless motivated by some strong sense of obligation or loyalty.

The telephone list, "KIS-POTS-GON" document, and the providing of bail, taken together, are persuasive evidence that Gerace and Materio have a more than casual relationship with Scarfo and his associates, and that Scarfo has an interest in the affairs of Local 54. However, there is further evidence in this regard which must be considered, much of which is based on the testimony of Joseph Salerno.

Salerno was the principal witness against Scarfo, Leonetti and Merlino at their trial for the murder of Vincent Falcone, and is now in the federal protected witness program. He testified before the Commission, and before the United States Senate (R8), about his experiences while a resident at 26-28 North Georgia Avenue, and in particular about the contact he observed between Scarfo and his associates and Gerace, Materio and other Local 54 officials.

Salerno was a plumber operating a small business in Brigantine, New Jersey (T665-666). In 1978 he encountered financial problems and went to Philip Leonetti,

whom he had met on a job site, for help (T668-669). Leonetti loaned Salerno $10,000 which he said he had gotten from Scarfo (T871), and charged him interest of $250 per week until the principal was repaid (T 669-670). Salerno wound up paying Leonetti $19,000 in principal and interest and going into bankruptcy (T 670).

Salerno also had marital problems and in June 1979 he moved out of his home and Leonetti allowed him to stay at a house in Margate owned by Salvatore Merlino (T671). He later moved to an apartment in Ventnor for two weeks and then into an apartment at 26-28 North Geogria Avenue (T672). He resided on those premises from sometime in September (T672) until December 17 or 18, 1979 (T677).

While residing at 26-28 North Georgia Avenue Salerno had frequent contact with Scarfo, Leonetti, Lawrence Merlino and Lumio, who was then secretary-treasurer of Local 54 and also a resident at 26-28 North Georgia Avenue.

Scarfo bragged to Salerno about having killed a man with a knife (T682) and claimed that his criminal organization was "going to own Atlantic City some day" (T683). He also tried to recruit Salerno into his crime family. He talked to Salerno about their having the same "blood line," asked him if he could "stand up" if he saw "something happen" in front of him, and several times asked him if he "would like to be a gangster" (T678-683). Salerno admitted to the Commission that he was intrigued by the idea of being involved in organized crime, and that he told Scarfo that he would like to be "a gangster" (T852).

Salerno admitted to Scarfo that he had two guns, and, at Scarfo's request, he gave the guns to him (T689-693).

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It was one of these guns with which, according to Salerno, Leonetti murdered Falcone in the presence of himself, Scarfo and Merlino (T693-694). The day after the murder Salerno left 26-28 North Georgia Avenue and soon thereafter he told his story to the police (T701).

Salerno testified that he met Gerace in the office of Scarf, Inc. soon after moving to 26-28 George Avenue (T706). He estimated that he saw Gerace in Scarfo's company 11 or 12 times during the course of his stay at the North Georgia Avenue property from September through mid-December 1979 (T707).

Salerno estimated that three or four of these meetings occurred at the office of Scarf, Inc. (T829); one occurred at the My Way Lounge, a bar owned by convicted extortionist and reputed Scarfo associate Saul Kane (T829-830); three or four occurred outside the premises of 26-28 North Georgia Avenue (T831), and two or three occurred in Scarfo's apartment (T831). The meetings in Scarfo's apartment occurred while Scarfo, Salerno and others, such as Lumio, Leonetti and Lawrence Merlino, were having dinner (T707). Gerace was not part of the dinner group (T865), but he would stop by for long enough to have a glass of wine (T832; 864). Gerace and Scarfo would walk off from the others and talk privately (T708). Salerno said he saw Gerace and Scarfo have these private conversations about six times, but he was never able to overhear what was said (T709).

Additionally, Salerno said that on at least three occasions when he was in the Scarf, Inc. office he accepted telephone calls from Gerace for Scarfo (T717). On the one occasion when Scarfo was at home, Salerno relayed the message to him and Scarfo told him to tell Gerace that he would return the call (T717-718). Scarfo then

went to a telephone booth on the corner to make a call (T718). Besides the three calls he had taken, Salerno said he saw messages for Scarfo from Gerace taken by others (T719).

In his tesimony before the Senate Salerno said that Gerace and Scarfo had daily contact directly involving the operation of the Union (R8, at 99). However, when cross-examined about this statement before the Commission, he admitted that he never overheard any conversation between Gerace and Scarfo and never heard them say anything to each other about Local 54, and had merely assumed that they discussed Union business (T795).

Counsel for the Union and Gerace have made much of this change in Salerno's testimony, and have urged that we reject his entire testimony. However, we can understand how Salerno came to assume that Scarfo and Gerace were conferring about Union business, and we note that when he was cross-examined on this topic before us he readily admitted that he had not actually heard Gerace and Scarfo discuss the Union.

It is clear from Salerno's testimony that he concluded that Scarfo talked to Gerace about Local 54 because of the frequent and surreptitions nature of their conversations, and because of certain statements he had heard Scarfo make about unions and Local 54 in particular.

For example, Salerno testified that Scarfo told him: "Don't ever worry about the unions, we own the unions" (T684). Salerno's testimony also established that Scarfo is a braggart and a liar (T892), and certainly this assertion by Scarfo could not be the basis for a finding that he and his associates "own the unions." However, his claim that they do is evidence of his desire to bring unions

within the sphere of influence of his criminal organization, and helps to explain Salerno's conclusion that Scarfo talked to Gerace about Local 54 business.

Salerno also related an incident when he and Scarfo were in Scarfo's apartment and Lumio stopped in and began reading a newspaper article which linked Scarfo to Local 54 (T714-715). At one point Lumio began to laugh because the article disclosed that he had been convicted of a crime several years earlier (T715). Apparently, Lumio found it humorous that his father might finally come to know of the conviction. This provoked Scarfo, who started to scream and curse at Lumio (T716). Salerno quoted Scarfo as saying:

> Let me tell you something, I got you your job and I got that other big fat j-o [Gerace (T839)] downstairs his job and don't you forget it. (T715)

When he heard this Lumio "just humbled himself kind of and shook his head up and down and just listened and left" (T715).

Salerno identified the newspaper as the *Philadelphia Bulletin* and approximated the date of the article as between early November and mid-December 1979 (T847). Subsequent investigation by the Division revealed that a *Bulletin* article dated December 2, 1982, had discussed the allegation that Local 54 was connected with organized crime, and had noted Lumio's 1974 conviction (D122).

We reject the Division's argument that Scarfo's hearsay statement provides the basis for a finding that Scarfo "engineered Gerace's ascension to the presidency of Local 54." However, we find that Scarfo did make the statement and that based upon the circumstances and Lumio's be-

havior, Lumio did evince his acceptance of the statement. We thus find in this testimony further evidence of Scarfo's desire to influence and control Local 54 and Lumio's belief that Scarfo was in some way responsible for Lumio's position with the Union. This evidence also provides further explanation for Salerno's assumption that Scarfo discussed the Local's business with Gerace.

Salerno also testified to an incident which occurred when he and Leonetti visited a building at 200 Texas Avenue, Atlantic City, which Local 54 had purchased and planned to renovate as its new headquarters (T720). Salerno said that when they arrived they met "Frank Monterino, or something like that" (T721). The Division later established that Salerno was referring to Frank Materio (D65).

Salerno stated that Materio showed him around the building (T721), after which they then rejoined Leonetti, who was conversing with Lumio (T722). Leonetti was insisting that he and Salerno get the plumbing work at the Local instead of a Vineland plumber named Falaska (T722). Leonetti told Lumio that he would inflate the bill and divide the overpayment among the two of them and Salerno (T723). Materio was within earshot of the entire conversation (T723). However, Salerno never submitted a bid on the plumbing work becaues he was busy on other jobs (T723, T881), and the work was done by Falaska (T839-840).

Materio testified that he never saw Leonetti at Local 54 headquarters (T1605) and that he has never met Salerno (T1610), and he denied that he incident described by Salerno ever took place (T1610).

We accept Salerno's testimony that this incident occurred, and find that Leonetti, a close associate of Scarfo,

attempted, albeit unsucessfully, to influence the affairs of Local 54. We also accept Salerno's testimony that Materio was in a position to overhear the Leonetti proposal, and reject Materio's contrary testimony. Further, we find the fact that Leonetti would make this illicit proposal in front of Materio an indication that the association between them is not as casual as Materio would have us believe. Finally, we find that this incident is still further evidence of the interest of Scarfo and his associates in the affairs of Local 54 and a further explanation of Salerno's assumption that Scarfo and Gerace talked about the Union.

Considering all of the evidence discussed to this point—the telephone list, the "KIS-POTS-GON" note, the bail, the Gerace-Scarfo contact and the various incidents testified to by Salerno—a clear picture emerges of a group of criminals who have an interest in unions and especially in Local 54, who covet Local 54 as a vehicle for the spread of their criminal enterprise and seek to exercise influence and control over it, and who have frequent contact with its leaders. As for Gerace and Materio, the evidence shows that they have a long-standing relationship with Scarfo and a sense of obligation to him, and that he has access to them. Whether all of this adds up to the type of association proscribed by section 86(f) is a question we need not decide, because there is considerable evidence, yet to be considered, concerning the Union's dealings with Scarfo associates and the role of Gerace and Materio in those dealings.

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III. DEALINGS OF LOCAL 54 WITH SCARFO ASSOCIATES

The dealings in question fall into two categories: the appointment to Union office or employment of persons tied to Scarfo, and business dealings of the Union with persons or firms tied to Scarfo.

We will deal first with the appointments, starting with a discussion of Gerace's position in the Union and authority to make appointments, then discussing his role in appointing Materio to his Union position, and finally considering the actions of Gerace and Materio in appointing other persons tied to Scarfo to positions within the Union.

Frank Gerace did not testify before the Commission, and the record is sparse on the subject of his background. It appears that he held some elective office in Local 508, which became Local 54 in about 1974, and that he then assumed the vice presidency of Local 54 (T954-958; 1867). Further, it appears that in 1976 he was elected vice president of Local 54 while Jack Brown was elected president. Sometime later in 1976 Gerace assumed the presidency when Brown left to become an organizer with the International (T958). In the beginning of 1978 Brown returned and resumed the top post, but he left again in the fall of 1978 to take a job with the Resorts International Hotel Casino (T958). At that time Gerace again assumed the presidency (T959). He was elected president in 1979 and 1982 (T1867), and he serves in that position today.

As chief executive officer, Gerace is authorized by the by-laws of the Local (C3) "to hire and discharge Business Agents, Organizers, Assistants and all other agents, subject to approval by a majority of the Executive

Board." Article IX, Section 1. Furthermore, Article VI provides in pertinent part:

> [V]acancies in all offices shall be filled for the unexpired term by appointment of the President, subject to the approval of the Executive Board.

Turning to Materio, a letter dated February 2, 1978, from the International to Jack Brown, then president of Local 54, indicates that Brown had solicited financial assistance from the International in order to hire additional employees for the Local (C3, letter of 2/2/78). The International acceded to Brown's request and three "local organizers" were hired by Local 54 on July 3, 1978. One of the three was Frank Materio. Then vice president Gerace moved to accept Materio and the others as organizers (C3, minutes of 6/30/78). On January 16, 1979, the Executive Board approved President Garace's appointment of Materio to the Executive Board as trustee (C3, minutes of 1/16/79).

We turn now to the appointments of the other Scarfo-connected individuals.

Robert Lumio

As previously explained, in August 1979 part of Local 54 splintered away and became Local 491 and Thomas Kissick, secretary-treasurer of Local 54, resigned to join Local 491 (C3, minutes of 8/13/79). To fill the vacated office of secretary-treasurer, Gerace appointed Robert Lumio (D56). Lumio occupied that position until his death by natural causes in June 1981.

We have already explained that Lumio lived at 26-28 North Georgia Avenue and have discussed Salerno's tes-

timony about Lumio's ties to Scarfo. In addition, we note that Lumio characterized himself as being friendly with Scarfo, Leonetti and Lawrence Merlino (D61). He was a proposed alibi witness for Leonetti following his arrest in 1977 for the murder of Guiseppi "Pepe" Leva (D67), and again for Leonetti, Merlino and Scarfo following their arrest in 1979 for the murder of Vincent Falcone (D61).

Frank Materio testified that he put up his house for bail for Leonetti and Merlino as a result of a request made by Lumio on behalf of Catherine Scarfo (T1608).

On April 4, 1979, an agent of the State Commission of Investigation saw Lumio and Nicholas Virgilio exchange a kiss in front of 26-28 North Georgia Avenue (T941-942). On April 7 the agent saw Lumio and Scarfo leave North Georgia Avenue in a car and later return (T942-943). On April 11 he saw Lumio with Scarfo and Leonetti (T943-945). On November 16, 1979, he saw Lumio with Scarfo and Leonetti at the Scarf, Inc. office (T947). Lumio was at the police station when Scarfo was released on bail after his arrest for the Falcone murder (T984) and attended a subsequent celebration at the Scarf, Inc. office (T987). On January 22, 1980, the Philadelphia police photographed Lumio in the company of Virgilio at the funeral of the mother of Saul Kane (T1221; D75). In short, Lumio's ties to Scarfo, Virgilio, Leonetti and Merlino were manifest.

Albert Daidone

According to his testimony before the State Commission of Investigation, Albert Daidone became a member of Local 170, a bartenders local in Camden, in about

1965 (D126, at 25-26). In 1978 he was elected vice president of that Local, running on a ticket headed by Ralph Natale (D126, at 26).

In January 1979 Natale was convicted of arson, racketeering and mail fraud and in February 1979 he was convicted on drug charges. He is serving a 12-year sentence on the former charges and a consecutive 15-year sentence on the latter (T1389; D104; D126, at 144; R8, at 25). He was described by FBI agents testifying before this Commission and the SCI as a major distributor of illegal drugs and the head of an arson-for-hire ring (T1389-1390; D126, at 144), and also as a "very close associate" of Angelo Bruno (D126, at 142). Charles Allen, a government informant and participant in the federal protected witness program, testified before the United States Senate about Natale's organized crime activities (R8) and before the SCI about his involvement with Rittenhouse Associates, a union dental plan administrator with organized crime ties, and with Larry Smith, the head of Rittenhouse (D126).

Daidone told the SCI that he is a friend of Natale (D126, at 32), Smith (D126, at 29-30) and convicted drug dealer (D105-107) Raymond Martorano (D126, at 33). He said it was his custom to see Martorano three or four times a week, and sometimes to act as his driver and to accompany him when he looked for locations to place vending machines (D126, at 34). He also said that he stayed with Martorano every day after Angelo Bruno was murdered, but he denied that he had acted as his bodyguard (D126, at 33-34). Daidone also admitted knowing Angelo Bruno (D126, at 36), Philip Testa (D126, at 37) and Frank Vadino (D126, at 35). He said that he had read in the newspapers that all of the above-named

individuals were connected with organized crime, but that he had no other information in this regard (D126, at 32-38).

When Natale went to prison in February 1979 Diadone continued to serve as an officer of Local 170. However, the Union then became Local 33. According to Daidone's SCI testimony, the new name was intended to "change the image of the union" (D126, at 31). At any rate, in early 1981 Local 33 merged into Local 54 (T1352-1353; C3, minutes of 11/4/80).

When Local 33 merged into Local 54, it became necessary for Local 54 to open a satellite office in Camden. At the Executive Board meeting of December 29, 1980, Frank Materio moved to authorize the Local 54 officers to appoint several individuals to staff the Camden office, including Daidone in the position of business agent (C3, minutes of 12/29/80). Materio told the Commission that at that time he knew nothing about Daidone and made this motion at the behest of Gerace (T1681-1685). Less than four months later, Gerace appointed Daidone to the Executive Board of Local 54 (C3, minutes of 4/28/81). Within another two months Gerace appointed Daidone vice president of Local 54, following the death of Robert Lumio (C3, minutes of 6/8/81).

Daidone remained vice president of Local 54 until his removal in September 1982 during the hearing before the Commission. Counsel for Local 54 explained that Gerace removed Daidone from office due to his indictment, along with Martorano, for conspiracy and extortion, and subsequent indictment for the murder of an official of the Philadelphia roofers union.

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Joseph Erace

Gerace informed the Executive Board at its meeting of March 9, 1981, that Joseph Erace, a business agent, was among three new staff members at Local 54 (D55). On December 14, 1981, Gerace appointed Erace to the Executive Board to complete the unexpired term of a deceased Board member (C3, minutes of 12/14/81).

Donna Savarese, a wine consultant and lounge manager at the Tropicana Casino Hotel, testified that on February 6, 1982, Erace approached her and stated: "I've got a friend I'd like to introduce you to" (T1114). Savarese accompanied Erace to a table where he introduced her to several people, including Scarfo, whom he referred to as "my friend Nick Scarfo" (T1114).

Later, Savarese was again approached by Erace and he questioned her about a member of the Tropicana security staff who had been following him and his party, which included Scarfo. Erace remarked that if this surveillance continued his "friends will take care of him" (T1116). Savarese understood Erace to be referring to Scarfo and his associates as his "friends" (T1116).

Roger Brown, lieutenant of security at the Tropicana, testified that he had been advised that Scarfo, Leonetti and Merlino would be dining at one of the Tropicana's restaurants on February 6, 1982, and that he was directed to keep them under surveillance. During the course of the evening, Brown saw Erace conversing with the three in the hotel lobby for approximately fifteen minutes (T1188). He said that when they approached they were all "friendly," but that the conversation became "business like" and "serious" (T1189).

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Frank Lentino

It is unclear exactly when Frank Lentino first became employed with Local 54. Materio testified that Lentino had worked as a business agent for Local 54 for approximately a year and a half (T1665). On June 8, 1981, Gerace appointed Lentino as Camden County office manager (C3, minutes of 6/8/81).

Lentino was a proposed alibi witness for Scarfo in connection with the Falcone murder (D66). Also, Lentino appears on the Scarfo telephone list under the name Frank Gray, with a coded number (T1034; D9).

There are thus six present or former employees of Local 54, *i.e.*, Gerace, Materio, Lumio, Daidone, Lentino and Erace, who are connected to Scarfo and other members of the Bruno crime family. Of these six, all but Lentino now serve or have served as Union officers. Materio was appointed to his Union office by Gerace, as were Lumio and Erace. Lentino was appointed Camden County office manager by Gerace. Daidone was appointed business agent on Materio's motion and was appointed an Executive Board member and vice president by Gerace.

We turn now to Local 54's business dealings with persons connected with Scarfo.

Toro Construction

At the January 16, 1979, Local 54 Executive Board meeting the board approved an expenditure of $105,000 for renovations of the new union headquarters and authorized the officers to "seek best union contractors" for the job. (C3, minutes of 1/16/79). Toro Construction Company be-

came the general contractor for the renovations (T1673). The job was done in March, April or May 1979 (T893).

As previously noted, Toro contributed $45,000 in cash to the bail for Scarfo, Leonetti and Merlino following their arrest for the Falcone murder (T1159-1160; R8, at 48; D68).

At the March 9, 1981, meeting of the Union Executive Board, a motion was made by Materio and passed by the Board to approve payment of $10,956.22 to Toro (C3, minutes of 3/9/81). It is clear from Materio's testimony before the Commission that when he made this motion he had no idea whether Toro had done work justifying this payment, but that he merely moved to pay the bill because it was on the table before him (T1667-1669). It is not clear if this bill was related to the original renovation work.

Local 54 presented testimony of John Rich, a business agent for Local 33 of the Bricklayers Union and president of the Building Trades Council of Atlantic City, that to the best of his knowledge Toro is a legitimate company, and was one of four or five union contractors he recommended to Gerace for the headquarters renovation. There is no evidence before the Commission of any irregularity in the way Toro obtained contracts or performed work for Local 54. However, Toro is one more connection between Scarfo and the Union.

Rick Casale

Rick Casale is a roofing contractor who was described by an SCI agent who testified before the Commission

as a "very close associate" of Scarfo (T938-939), and whose name was on Scarfo's telephone list (D9). He was also described by Salerno as a frequent visitor to 26-28 North Georgia Avenue (T848-849). Casale did the roofing work on the renovation of Local 54 headquarters (T939). There is no evidence that there were any irregularities in the way the work was done or paid for. However, Casale represents one more connection between Scarfo and Local 54.

Vincent Sausto

Vincent Sausto, whose name was also on the Scarfo telephone list (D9), is an insurance broker and real estate agent who handles insurance policies for Scarfo and his relatives, who has been seen with Scarfo and on the premises of Scarf, Inc. "on numerous occasions," and who has admitted being a "social acquaintance" of Scarfo (T939-940). Sausto received part of the real estate commission on the sale of the Local 54 headquarters building (T939-940). The building was sold for $175,000. The commission was $14,500, of which Sausto received $5,800. The remainder of the commission went to Phillip Guber, the owner of the real estate agency for which Sausto worked, and to a Mrs. Lashman, the listing broker (T978; 996). The commission on the Local 54 building was one of only two real estate commissions earned by Sausto in the year 1979 (T989). Of course, the commission was paid by the seller of the building, a Mr. Jack Apple (T978). However, it appears that Sausto was the agent who represented Local 54 in the purchase of the headquarters property, and he represents one more tie to Scarfo.

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Affiliated Leasing

In March 1979 Affiliated Leasing Systems, Inc. leased a car to Phillip Leonetti. As a result of a "lead" from Leonetti, Affiliated sold a car to Virgilio. On December 18, 1979, Robert Wayne, an account executive with Affiliated and his superior, a Mr. Goldblatt, went to the offices of Scarf, Inc. to deliver the Virgilio vehicle. Leonetti, Scarfo and three or four other persons were present at the Scarf, Inc. office (T1463-1464). Someone suggested to Wayne that he contact Local 54 with regard to the possible leasing of other vehicles (T1466). Wayne testified before the SCI that it was Scarfo who made this suggestion (T1472-1473). In interviews with the SCI, the FBI and the Division, Wayne also identified Scarfo as having made the suggestion (T1474-1475; 1497). However, in his testimony before the Commission Wayne said that "for the longest period of time" he believed it was Scarfo who made the suggestion (T1467), but that he had discussed the matter with Goldblatt, and Goldblatt had told him that he had been sitting next to Scarfo and that Scarfo had said nothing (T1485). Therefore, at the time of his testimony before the Commission Wayne was no longer sure who had made the suggestion (T1467; 1484). But, he did contact Lumio, and as a result Affiliated leased two vehicles to Local 54 (T1468-1470). Shortly before Wayne's testimony the Union returned the vehicles "on the advice of counsel" (T1476).

We find that it was Scarfo who suggested to Wayne that he call Lumio about the possibility of renting cars to Local 54. In addition, the mere fact that the discussion took place in the presence of Scarfo, at the Scarf, Inc. office, is sufficient to find this one more in-

dication of Scarfo's interest and involvement in the affairs of Local 54, notwithstanding Wayne's testimony that the lease agreements between Affiliated and Local 54 were entirely legitimate (T1482-1483). Nevertheless, this is one more instance of Scarfo's involvement in the affairs of Local 54.

Frank D'Addario

Frank D'Addario is a partner in Claridge Associates, which in turn is a partner in Claridge Limited, which owns the Claridge Hotel and Casino. D'Addario is also one of the two members of Claridge Management Corporation, which for a time managed the Claridge. During that time D'Addario met with Frank Gerace and asked him about the unfavorable newspaper publicity involving Local 54 (T1062; 1072). Gerace responded that because of his mother's friendship with Scarfo's mother allegations were being made that Scarfo had influence over the Union (T1062-1063). D'Addario was later introduced to Scarfo at a boxing match at the Claridge, and said to him: "Say hello to my friend, Frank, if you see him" (T1060-1061). Scarfo responded that he had heard of D'Addario "either through or from" Gerace (T1063).

The Division asks us to take Scarfo's statement that he had heard of D'Addario through or from Gerace as an indication that Gerace discusses Union business with Scarfo. However, to do so we would have to accept Scarfo's hearsay statement as true. We can make a finding on the basis of hearsay evidence if it is legally competent evidence under one of the exceptions to the hearsay rule, Evid. R. 63, or, failing that, if it is nonetheless "the sort of evidence upon which re-

sponsible persons are accustomed to rely in the conduct of their serious affairs." N.J.S.A. 5:12-107(a)(6). *See, In the Matter of the Application of Seymour Alter for Licensure as a Casino Key Employee,* Docket No. 79-EA-60 (1980), at 4-7. Scarfo's statement does not fall within any exception to the hearsay rule, and the Division does not suggest that it does. Nor do we think that an off-hand social comment by Nicodemo Scarfo is the type of evidence upon which responsible people would rely in the conduct of their serious affairs. We therefore decline to rely on Scarfo's statement as establishing that he in fact heard about D'Addario through or from Gerace. However, we do find that Scarfo made the statement, and we see it as an indication of his willingness to use his relationship with Gerace to give the impression that they do discuss Gerace's business affairs.

In summary, the "business associations" evidence establishes that the commission for the sale of the Union building was paid in part to a Scarfo associate; the $170,000 renovation fo the building was done by a company which put up $45,000 in bail for Scarfo, Leonetti and Merlino; the roofing work was done by a Scarfo associate; and Scarfo was aware of the Union's need for vehicles and recommended that the leasing company used by Leonetti and Virgilio contact the Union. When these four business connections are considered together with the fact that six persons with ties to Scarfo were officials of the Union, the inference that there is more at work here than coincidence becomes irresistible. However, before attempting to reach any broader conclusions, we must consider one additional evidentiary item urged by the Division, *i.e.,* Gerace's failure to testify, and also give further consideration to the evidence offered by Local 54.

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IV. FAILURE OF GERACE TO TESTIFY

Frank Gerace was called as a witness by the Division and refused to testify, invoking his Fifth Amendment privilege against self-incrimination (T2368-2371), and the Division asks us to make a variety of findings based on Gerace's silence.

Of course, the Fifth Amendment guarantees "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964). Thus, Gerace had a right to invoke the Fifth Amendment and the Commission cannot impose any "penalty" because of his exercise of that right.

However, the Division argues that the drawing of evidentiary inferences from Gerace's silence would not constitute a "penalty." The Division relies on *Duratron Corp.* v. *Republic Stuyvestant Corp., et al.*, 95 N.J. Super. 527 (App. Div. 1967), *certif. den.* 50 N.J. 404 (1967), a civil action seeking damages for fraud, in which it was held that the finder of fact could draw an adverse inference from the refusal of a defendant to testify. The court explained that the defendant "risked only the probative strengthening of a civil claim against himself with an ultimate hazard of nothing more than a money judgment against him," and also that even this consequence did not flow automatically from his invocation of the Fifth Amendment, but lay within the discretion of the factfinder. The court concluded that this was not such a momentous "penalty" as to run afoul of the Constitution, and explained:

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> The permissible drawing by the factfinder of an inference of inability truthfully to deny a civil claim from a defendant's failure to testify as to relevant facts within his personal knowledge which might refute the evidence adduced against him, is a logical, traditional and valuable tool in the process of fair adjudication. It subserves private justice. We conclude that it does not impair the privilege against self-incrimination.
>
> [95 N.J. Super. at 533]

Similar reasoning has been applied in cases involving consequences other than money judgments. In *Baxter* v. *Palmigiano,* 425 U.S. 308 (1976), involving an inmate who refused to testify at a prison disciplinary proceeding, the Court applied "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." 425 U.S. at 318. In *Diebold* v. *Civil Service Commission, etc.,* 611 F.2d, 697 (8 Cir. 1979), the court applied the same rule to an administrative proceeding in which a public employee suspended because of pending criminal charges sought reinstatment in his job.

However, Local 54 and Gerace raise several arguments against the drawing of advere inferences from Gerace's refusal to testify. First, Local 54 appears to argue that the rule permitting an adverse inference against a party who fails or refuses to testify is inapplicable here because Local 54 and the Division are the only parties to this action. However, even assuming that Gerace is not a party, *cf.* N.J.A.C. 1:1-1.4, there is authority to support the drawing of inferences adverse to Local 54 on the basis of Gerace's failure to

testify as a nonparty witness. *See, Brinks, Inc.* v. *City of New York,* 539 F. Supp. 1139 (S.D.N.Y. 1982).

In addition, counsel for Gerace asserts that he advised his client not to testify before the Commission because he is currently a subject of a federal grand jury investigation. However, the pendency of a grand jury probe would not preclude the drawing of an evidentiary inference from Gerace's silence. *Cf., Whippany Paper Board Co.* v. *Alfano,* 176 N.J. Super. 363 (App. Div. 1980).

Counsel for Gerace voices the additional argument that the Division has "unclean hands" in this matter because it could procure Gerace's testimony by requesting that the Commission grant him testimonial imunity. *See,* N.J.S.A. 5:12-67. The Division responds that it has decided not to seek immunity for Gerace as an accommodation to other law enforcement agencies which are "concerned about maintaining the viability of any future criminal prosecution of Gerace" (Reply brief at 10). Regardless of the merits of this controversy, we do not perceive the granting of immunity as being a prerequisite to the drawing of an adverse inference from Gerace's failure to testify.

Finally, Local 54 and Gerace state that the present action was instituted by the Attorney General's Office, of which the Division is a part; is punitive in nature; is based on alleged involvement with organized crime, and has potentially grave consequences for Gerace, Materio and the Union itself. Thus, the Union and Gerace argue, the drawing of any adverse inference from Gerace's invocation of the Fifth Amendment would amount to the imposition of an impermissible "penalty".

It is clear that this is a civil action, and it is also clear that there is nothing punitive about it. We know of no

authority precluding the discretionary drawing of an adverse inference based on the invocation of the Fifth Amendment in a civil action. However, we choose not to draw any inference from Gerace's refusal to testify. The inference flowing from the failure or refusal to testify is permissible, not mandatory. Viewing the record as a whole, we find it unnecessary to draw any inference from Gerace's refusal to speak, and elect to attach no probative significance thereto.

Finally, the evidence presented by Local 54 deserves further consideration.

V. TESTIMONY ON BEHALF OF LOCAL 54

Local 54 presented sixteen witnesses on its behalf. A number of people from the labor movement testified that both Gerace and Local 54 were effective and honest employee representatives. They included: Joseph J. Mendary, a business manager with Local 334 of the International Electrical Workers; Charles Marciante, president of the New Jersey AFL-CIO; John S. Rich, a business manager for Local 13 of the Bricklayers Union and president of the Building Trades Council of the Atlantic and Cape May Counties area; and James Gratton, a busines manager with the Electricians Union for Monmouth and Ocean Counties and president of the Building Trades Council for the same areas. Rich testified: "I would say he's [Gerace] one of the more dedicated labor union leaders that I know. . . . And I don't think that Frank would do anything wrong intentionally" (T2211).

Similarly, several individuals associated with management testified that Gerace was a tough negotiator and that

his paramount concern always seemed to be the welfare and interests of the union members. These witnesses included: William A. Whiteside, Jr., an attorney with Rothschild, O'Brien and Frankel; Donald Buzney, Director of Labor Relations at Bally's Park Place Casino Hotel; William G. Rosenthal, an attorney with Shaw and Rosenthal; William J. Downey, Executive Director of the Casino Hotel Assocation; Martin L. Blatt, an attorney practicing in Atlantic City; Frederick A. Schenck, Senior Vice President of Administration at Resorts International. Rosenthal testified: ". . . he [Gerace] is a responsible labor leader who is interested in the welfare of his members and his constituants [*sic*] who has an interest in the industry and has demonstrated that responsibility throughout our dealings" (T2237).

Three union members testified on behalf of Gerace and Materio. Jane Illingworth, Mickey Fairfield and Michael C. Tenuto testified that both men are accessible to the Union membership, earnest in their desire to serve the membership and honest and straightforward in running the Union. When asked whether he thought Scarfo had any influence on the operations of the Union, Tenuto stated: ". . . I don't think nobody [*sic*] runs the Union except really the members because we call the shots for what we want and he [Gerace] backs us up with [*sic*] the tee" (T2258).

Vincent Pasquale, a catholic priest and director of the Alcoholic Council Service, and Paul Longo, president of the Atlantic City chapter of UNICO, testified that Gerace has an excellent reputation for honesty and integrity.

Finally, Warren Borish testified that he has represented labor unions for approximately ten years (T1808) and has worked closely with Gerace for at least the past five or six years (T1810). Borish described Local 54 as an aggressive,

independent, knowledgeable and successful labor organization (T1811). Further, he characterized Gerace as a "very independent person" who "does what he thinks is best for the interests of the membership" (T1816). Borish contended: ". . . I've seen absolutely nothing over five or six years with relationships with this Local that would indicate that anybody, including Mr. Scarfo or any other person, has any influence over Local 54 or any of its officers" (T1816).

The testimony of Local 54's witnesses is essentially uncontradicted. We have no reason to doubt the sincerity of their testimony, that, to the best of their knowledge, Gerace is a knowledgeable and hard-working union leader and Local 54 is an effective represenative of its members. We likewise accept the testimony of those witnesses who said that they had not discerned the presence of any Scarfo influence in the affairs of the Local.

However, none of this precludes a finding that Gerace and Materio are associated with Scarfo in the manner described in section 86(f). Such an association would of necessity be clandestine and none of these witnesses would be in a position to detect its existence. We will weigh the testimony of Local 54's witnesses along with all of the other evidence in reaching our conclusion as to the qualifications of Gerace and Materio. It is to that conclusion that we now turn.

VI. CONCLUSION AS TO ASSOCIATION OF GERACE AND MATERIO WITH SCARFO ET AL.

The Commission is now called upon to apply a seldom-used but vitally important part of the Casino Control Act,

section 86(f). Before doing we think some general comments on the nature of the casino industry and our role as regulators of that industry are in order.

It can hardy be gainsaid that legalized gaming is not only potentially harmful to the public but extremely sensitive and vulnerable to improper influence. *Niglio* v. *New Jersey Racing Commission,* 158 N.J.Super. 182, 188 (App. Div. 1978); *See also,* National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, *The Development of the Law of Gambling: 1776-1976* (1977). Indeed, the Federal Bureau of Investigation has long maintained that gambling is the "lifeblood of organized crime." *See,* Testimony of Frederich Fehl, Acting Asst. Dir., FBI, before the federal *Commission on the Review of the National Policy Toward Gambling,* Hearings in Washington, D.C., May 10, 1976.

Thus, New Jersey has allowed casino gaming only under an extraordinary, pervasive and intensive system of statutory and administrative controls. *See, Bally Manufacturing Corp.* v. *N.J. Casino Control Commission,* 85 N.J. 325, *appeal dismissed,* 102 S.Ct. 77 (1981); *In re Martin,* 90 N.J. 295 (1982). A review of the legislative history makes it clear that section 86(f) is an essential component of that system.

In 1977, the Attorney General and the Treasurer of New Jersey, at the Governor's request, assembled a group of senior staff personnel to make recommendations on casino gambling legislation and related topics. That staff policy group concluded that "the uniqueness of the industry, taken with its potential societal consequences and its checkered history in other jurisdictions, compels a state regulatory interest in virtually every aspect of casino and related op-

erations." *Second Interim Report of the Staff Policy Group on Casino Gambling,* (1977) at 2. The report went on to emphasize that the state interests to be served by a comprehensive regulatory scheme included more than the traditional law enforcement interest. *Id.*

Moreover, prior to the enactment of the Casino Control Act, the State Commission of Investigation specifically advised the Governor and members of the Legislature that the nature of the casino industry made it a "vulnerable target for criminal intrusion." *Report and Recommendations on Casino Gambling by the Commission of Investigation of the State of New Jersey,* (1977) at III. The SCI emphasized that only the "most stringent of gambling control laws can thwart the infiltration of casino and related services and suppliers by organized crime." *Id.* at II.

Significantly, the SCI noted that its experience regarding organized crime strongly suggested that there were:

> few better vehicles utilized by organized crime to gain a stranglehold on an entire industry than labor racketeering. Organized crime control of certain unions often requires the legitimate businessmen who employ the services of the union members to pay extra homage to the representatives of the underworld. Moreover, the ready source of cash which union coffers provide can be employed as financing of all sorts of legitimate or illicit ventures. Because of the gravity of the public interest in this particular area, the Commission is of the view that the representatives of labor organizations involving casino employees should be required to register and subjected to qualification according to

> the ownership disqualification criteria. (*Report and Recommendations on Casino Gambling by the Commission of Investigation of the State of New Jersey, Id.* at 2)

Accordingly, the State Commission of Investigation recommended regulation over labor unions affiliated with Atlantic City casino hotel facilities. *Id.* It is not surprising that the New Jersey Legislatiure heeded that advice. Indeed, in enacting the Racketeer Influence and Corrupt Organizations (RICO) Act, 18 U.S.C.A. §1961 *et seq.*, in 1970, Congress also recognized the explosiveness of the combination of labor racketeering and gambling.

The record in this hearing is replete with examples of organized crime infiltration of labor unions. We have previously mentioned the situation of Local 170 under Ralph Natale. We will turn to another such situation, that of Teamsters Local 326, shortly. The transcript of the United States Senate hearing on organized crime involvement in unions (R8) refers to many more examples. Of course, the problem of organized crime infiltration of labor unions becomes all the more acute in the case of a union which represents workers in the gambling industry.

In addition, we cannot overlook the fundamental policy of the Act to foster public trust and confidence in the integrity of the casino industry and related operations, and in the efficacy of the regulatory process.

At the very heart of the public policy set forth in the Casino Control Act is the assurance of "the public confidence and trust in the credibility and integrity of the regulartory process and of casino operations." N.J.S.A. 5:12-1(b)(6). Directly related to this purpose is the legislative declaration that "the regulatory provisions . . . are

designed to extend strict State regulation to all persons . . . practices and associations related to" casinos and that "comprehensive law-enforcement supervision . . . is further designed to contribute to the public confidence and trust in the efficacy and integrity of the regulatory process." *Id.*

Hence, it is the expressed policy of the State of New Jersey to regulate and control all aspects of the casino industry with the "utmost strictness' to the end that public confiedence and trust in the honesty and integrity of the State's regulatory machinery can be sustained. *Knight* v. *City of Margate,* 86 N. J. 374, 392 (1981).

With this background in mind we must apply section 86(f) to the facts as we find them in this case.

Section 86(f) provides for disqualification upon the finding of an association with a career offender or career offender cartel member "in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this act and to gaming operations."

There is no doubt that Gerace and Materio have an association with Scarfo, *et al.* The issue before us is whether that association has been shown to be inimical to the policy of the Act and to gaming operations. Viewing the record as a whole, we must conclude that it has.

We have been presented with a clear picture of a dedicated group of lawbreakers, headed by Scarfo, who follow the activities of Local 54, have a longstanding relationship with and easy and frequent access to its leaders, and seek to exploit that relationship in order to advance their criminal activities. We have also seen a consistent pattern of the Union staffing its hierarchy with persons associated

with Scarfo and doing business with persons and firms with ties to Scarfo. The evidence presented during this hearing simply cannot be explained away as a matter of chance or coincidence, or as the result of Gerace's mother being a friend of Scarfo's mother or Materio having played an occasional game of cards with Scarfo's late father.

In other words, the appointments and business associations, when viewed in the light of the evidence concerning Scarfo's interest in the Union and access to its leaders, lead ineluctably to the conclusion that there is a "Scarfo effect" at work in this Union. It is true that no direct evidence was presented during these proceedings that any of the appointments or business associations resulted from Scarfo's influence and that in a few instances, such as Toro Construction, there is some contrary evidence. However, the sheer number of instances renders it impossible to ascribe them to coincidence or to anything other than Scarfo's influence over Gerace and Materio.

We are also aware that the record is silent as to whether any of the Scarfo-related appointees have acted illegally or otherwise improperly in the conduct of the Local's affairs, or that any of the business associations were other than legitimate. However, once the influence of a career criminal such as Scarfo has been shown, we need not wait for its inevitable detrimental effect on the Union and utlimately on the casino industry to become manifest before we can act. The fact of influence by a person such as Scarfo is inimical to the policy of the Act and gaming operations.

Briefly reviewing the evidence with specific reference to Gerace, Scarfo kept Gerace's name, and those of his

mother and "girl" on his telephone list in code. Gerace covertly put up $10,000 in bail for Scarfo, Leonetti and Merlino. In three and one-half months at 26-28 North Georgia Avenue, Salerno observed frequent contact between Gerace and Scarfo, including private conferences and a call returned from a telephone booth. Gerace appointed Materio, Lumio, Daidone, Erace and Lentino to their Union posts. As president of the Union he was surely involved in the various business dealings with Scarfo associates. In short, it is clear to us his association with Scarfo is of such a nature as to create a reasonable belief that it is inimical to the policy of the Casino Control Act and to gaming operations. Such an association flies in the face of the stated statutory and policy considerations and cannot be accepted.

As to Materio, his name was on Scarfo's telephone list, although he claimed to have no idea why. He put up his house as bail for Leonetti and Merlino, although he claimed he barely knew them. He testified that he put up his house as a favor to Catherine Scarfo, but offered no reasonable explaination of why he would take such action on her behalf. He proposed that the Union pay Toro Construction over $10,000 but had no idea if Toro had done any work justifying the payment. He moved before the Executive Board to authorize the appointment of Daidone to the Union staff, but claimed that when he did so he knew nothing about Daidone. Leonetti made his proposal to inflate the bill for the plumbing at the Union headquarters in front of Materio, and Materio said nothing. The minutes of the Executive Board meetings show that Materio, to give a few examples, moved to accept the appointment of Lumio as secretary-treasurer (C3, minutes of 8/13/79), nominated Lumio to run for election as secretary-treasurer

(C3, minutes of 10/1/79), seconded the nomination of Gerace to run for president (C3, minutes of 10/1/79), moved to authorize the officers to appoint Daidone as business agent (D125, minutes of 12/29/80), moved to accept the appointment of Daidone to the Executive Board (C3, minutes of 4/28/81), moved to accept the appointments of Daidone as vice president and Lentino as officer manager (C3, minutes of 6/8/81), moved to approve the appointment of Erace to the Executive Board (C3, minutes of 12/14/81) and nominated Erace for election to the Executive Board (C3, minutes of 6/7/82).

In Materio's case we do not have evidence of direct, frequent contact with Scarfo, *et al.* However, the nature of their relationship is revealed by the telephone list, the bail and the incident involving the plumbing at the Union headquarters. When Materio's actions as an Executive Board member are viewed in light of this relationship, we must conclude that an association inimical to the policy of the Act and to gaming operations exists.

We therefore find that Frank Gerace and Frank Materio are disqualified under section 86(f).

There is one other alleged association which the Division urges as a section 86(f) disqualifier, *i.e.*, that between Gerace and Eugene Boffa, to which we will now turn.

VII. ASSOCIATION OF GERACE AND BOFFA

Eugene Boffa was for some years engaged, through a variety of corporations, in the labor leasing business. He would, for a fee, provide a business, such as a trucking company or a hotel, with all of its workers. The workers would be employed by Boffa, and he would handle the col-

lective bargaining, labor disputes, payment of wages and benefits, etc.

Labor leasing can be a legitimate business, but it was not in Boffa's case. He employed workers from Teamsters Local 326 in Delaware (T1270) and made regular payments to the Local's president, Frank Sheeran, in exchange for which Sheeran did a variety of things favorable to Boffa and inimical to his Union's members. In short, Boffa was buying labor peace (T1275-1277). As a result of their activities Boffa and Sheeran were convicted on a variety of federal criminal charges (D86). Boffa was sentenced to 20 years in prison and Sheeran was sentenced to 18 years (T1282). It seems clear that Boffa is a career offender.

The Division placed in evidence transcripts of two taped conversations, one between Charles Allen and Sheeran (D81) and the other between Allen and Boffa (D84). Both were made while Allen was carrying a recorder placed on his person by the FBI.

The taped conversation between Allen and Sheeran occurred on December 1, 1978. They discussed labor leasing arrangements involving, *inter alia*, hotels (D81, at 4-6). The only reference of direct relevance to this case is the following:

> FS: Yeah, I want, I just gotta meet this guy from Local 54, Frank Recia is his name?
>
> CA: Yeah.
>
> FS: You know him?
>
> CA: Yeah.
>
> FS: Frank—I can't pronounce his name. I got a name, here. I got to meet Ralphie tomorrow at 12 o'clock. (D81, at 5)

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It seems reasonable to conclude that the "guy from Local 54" is Gerace, who at that time was president of the Local. It also seems clear that "Ralphie" is Natale, who was then secretary-treasurer of Local 33. Sheeran and Natale were corrupt labor leaders. However, the fact that Sheeran was going to meet Gerace does not justify an inference that they were meeting for a venal purpose. The tape gives no indication of Sheeran's purpose in meeting "Frank Recia," and therefore this tape is not of great significance.

On the Allen-Boffa tape there is a clearer and potenitally more damaging reference to Gerace. The transcript of the tape reads:

> "EB: (Unintelligible) You know, I don't bother like, even with Atlantic City—I'll give you an example—this guy is hot shit there—the union guy down there. He was a nice guy so come—I said, OK 'Here, buy yourself something.'
>
> CA: What union? Teamsters?
>
> EB: Uh, no. The other guy, uh Frank Gerace.
>
> CA: Oh. You want somethin' done with him?
>
> EB: No, he's alright.
>
> CA: Okay, Okay.
>
> EB: I said, 'Here, buy yourself something' (Unintelligible) I says, 'this has nothing to do with this, alright?' So he tells them that I gave him something, see. So he says, 'Hey, don't give them nothin'.' 'It goes to us.' 'Hey,' I said, 'I don't give a shit. I haven't given him anything.' It's just like if you came into me and, uh, I threw you a tip or something. I'm not, uh, I'm not paying you off. I'm not saying I give it to you, I don't want to give it to them. It had nothing to do with them. He didn't use his head. So, now I can't give him nothing even if I want to.

CA: Hmm. And he told them. Who, who did he tell?

EB: He told Frank.

[D84, at 22-23]

The Divison presented other evidence indicating that Boffa had a labor leasing agreement with Penthouse International to supply workers to the Holiday Inn in Atlantic City, and that the Holiday Inn was a signatory to the non-casino hotel contract with Local 54. On the basis of this evidence and the above-quoted conversation, the Division asks us to find that Boffa made a payment to Gerace "for the purpose of purchasing labor peace at the Penthouse Holiday Inn project, and that this payoff may have manifested a corrupt agreement between Gerace and Boffa to enrich themselves, possibly at the expense of Local 54 employees" (Brief at 48). If the Commission did make such a finding, it would be dispositive on the issue of Gerace's disqualification, as it would evidence not only an association with a career offender, but an association for a corrupt purpose, which would certainly satisfy the "inimical" requirement of section 86(f). In addition, if Boffa was supplying workers to the Holiday Inn and Gerace was representing those workers, any payment by Boffa to Gerace, regardless of its purpose, would be a misdemeanor under 29 U.S.C.A. § 186. Commission of this misdemeanor, even without prosecution, might also disqualify Gerace under sections 86(g) and 86(c)(4) of the Act.

However, in our opinion the Division's interpretation of the facts is not supportable. The first question in this regard is whether the record justifies a finding that Boffa in fact gave money or some other thing of value to Gerace. Certainly Boffa seems to be saying that he gave Gerace

money. Allen told the Senate that "Eugene Buffalino [*sic*] . . . mentioned that he gave a gift, meaning money to Frank Gerace, and that Fra[illegible] Sheeran, the man I work for, got mad at him . . ." (R8, at 85). Thus, Allen apparently understood Boffa to be saying that he gave money to Gerace. However, the question is whether Boffa's statement to Allen can form the basis for finding as fact that a payment was made.

Boffa's statement is obviously hearsay, and thus can support a finding of fact only if it fits within one of the exceptions to the hearsay rule or if the Commission finds it to be reliable evidence under section 107(a)(6) of the Act.

Only one of the exceptions to the hearsay rule has any possible relevance here, namely, *Evid. R.* 63(10), which provides:

> A statement is admissible if at the time it was made it was so far contrary to the declarants pecuniary or proprietary interest or so far subjected him to a civil or criminal liability or so far rendered invalid a claim by him against another or created such a risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true . . ."

Bearing in mind that we are dealing here with a transcript of a conversation between a career criminal and a career criminal-turned-informer, in our view it it not clear that Boffa made a declaration against interest within the meaning of the above-quoted evidence rule. Boffa would probably not have believed that his statement to Allen would subject him to pecuniary or

proprietary loss, subject him to civil or criminal liability, or expose him to "hatred, ridicule or social disapproval in the community."

The question then becomes whether Boffa's statement is nonetheless reliable within the parameters of section 107(a)(6). Again, this was a conversation between two career criminals. One of the participants, Allen, was lying throughout the conversation because he had an ulterior motive, namely cooperating with the FBI. There is no way of knowing what motive Boffa may have had in talking to Allen. In our view responsible persons conducting serious affairs would not rely on the statements made by Boffa to Allen on this tape.

Even if we were to find that a payment was made, other factual determinations would have to be made. For instance, it would have to be determined whether, as the Division urges, that the payment was a payoff for labor peace. Boffa clearly seems to be saying to Allen that he was not paying off Gerace. The Division is apparently asking the Commission to accept Boffa's statement that he gave money to Gerace but to reject his statement that it was not a payoff. We are not aware of any basis to support this kind of selective acceptance of Boffa's comments.

Furthermore, the Division's argument is premised on the assumption that Boffa supplied workers to the Holiday Inn at a time when the Holiday Inn was a Local 54 shop. There is evidence in the record from which it could be found that a company controlled by Boffa, American Labor Services, did supply workers to the Holiday Inn, but it is questionable whether the record would support a finding that American Labor Services used Local 54 employees.

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FBI agent Tamm testified that he did not know if there was ever a collective bargaining agreement between American Labor Services and Local 54, but that he assumed there was because of the statement in the Allen-Sheeran tape that Sheeran was going to "meet this guy from Local 54, Frank Recia" (T1356-1357; T 1362; D81, at 5). However, during cross-examination Tamm agreed that the Allen-Sheeran tape indicated that whatever payoffs were being made, at the Holiday Inn or elsewhere, were being made to Sheeran (1335).

The Division correctly points out that the Local 54 Executive Board minutes of 9/12/77, 10/3/77, 12/5/77, 2/13/78, 4/3/78, 9/5/78, 3/5/79, and 4/4/79, contain references to arbitration and contract matters concerning the Holiday Inn, and that the minutes of 9/10/79 contain a reference to an agreement with Penthouse regarding welfare benefits. It thus seems clear that there was a collective bargaining agreement between Local 54 and the Holiday Inn, and specifically between Local 54 and Penthouse as the owner of the Holiday Inn. However, the question is whether the relationship between the Holiday Inn and Local 54 continued during the time that American Labor Services supplied employees to the hotel. On this question the deposition of Gerald Adler, a former Penthouse employee, is the only evidence.

Adler said that he attended a meeting sometime around April or May of 1978, at which Boffa proposed a labor leasing agreement between American Labor Services and Penthouse (D124, at 87-89). Adler identified a memo which he wrote after that meeting. The memo is dated May 1, 1978, and states: "Boffa will: Negotiate details of labor contracts; notify union and association

that we withdraw; negotiate new contracts with operating engineers and casino workers; do background checks; maintain labor pool" (D124, at 96-97). The record does not contain any explanation of the phrase "notify union and association that we withdraw," although this might indicate that the Holiday Inn was withdrawing from the industry-wide contract with Local 54.

Adler's deposition establishes that Penthouse did enter into a contract with American Labor Services, but does not establish when the contract commenced or when it ended. He was shown an unsigned contract dated July 9, 1978, and said that it "could have been" a contract submitted by Boffa (D124, at 97-98). He also identified a letter which he sent to Boffa suggesting changes in the contract Boffa had proposed. The letter is simply dated "October." Adler could not understand the date because he left Penthouse's employ in late September (D124, at 102). He "supposed" that the letter was sent sometime in July, August or September 1978 (D124, at 103). Adler said that he did not remember when American Labor Services actually started supplying workers at the Holiday Inn but that he had "a feeling they would have waited until something was signed before starting" (D124, at 102). Finally, Adler said the "several months" after he left Penthouse he heard that they had "dropped" American Labor Services (D124, at 133-134).

It thus appears that Boffa supplied workers to the Holiday Inn for some relatively brief period of time during the latter half of 1978. However, it seems to us speculative to conclude that Boffa's company utilized Local 54 workers.

Even if it is assumed that American Labor Services had a collective bargaining agreement with Local 54 during the

time that it supplied workers to the Holiday Inn, and also assumed that Boffa made a payment to Gerace, the Division's argument requires the further assumption that the payment occurred during the time that American Labor Services was supplying workers to the Holiday Inn. However, as previously explained, the record does not definitely establish the time during which the contract between American Labor Services and Penthouse was in effect or the time of the alleged payment to Gerace. The contract between American Labor Services and Penthouse was probably in effect for some brief period during the second half of 1978. The taped conversation between Boffa and Allen occurred on February 2, 1979. Thus a payment may have been made during the time that the contract was in effect, but again the Commission is left to speculate.

We, therefore, do not think this evidence provides a basis for disqualifying Gerace.

Kirkland and LaSane

The first question with respect to Kirkland and LaSane is whether they are officers, agents or principal employees of Local 54 within the meaning of section 93.

N.J.A.C. 19:41-12.1 defines "agent" as:

> any person, whether compensated or not, who is authorized or allowed to represent a labor organization in any employment matter relating to employees licensed under the act and employed by a casino hotel or casino licensee, or who undertakes on behalf of the labor organization to promote, facilitate or otherwise influence the relations between the labor organization and the casino hotel or casino licensee.

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Eli Kirkland has been employed by Local 54 for approximately two and one half years (T215) and receives a salary of $400 a week (T216). He handles grievances emanating from union members employed in kitchen and maintenance positions in the nine operating casino hotels (T216, 218). Kirkland testified that he attends hearings with union members and attempts to resolve their differences with management (T216).

When asked what the title of his job was, Kirkland answered, "I guess you could call me like an agent" (T248). Kirkland identified himself as an "agent" on his Labor Organization Individual Disclosure Form filed with the Commission (D8).

Karlos LaSane has been employed with Local 54 since May 4, 1981 and receives $410 a week in salary (T287-288). LaSane represents union members employed at Bally's Park Place and Caesars Boardwalk Regency at grievance hearings. Mr. LaSane testified that he attends grievance hearings, speaks on behalf of union members and attempts to resolve whatever problems exist between the employees and management (T290).

LaSane contended that he receives an average of fifteen calls a day from Union members "seeking information on filing grievances, interpretation of the contract and what Management is doing or not doing in respect to the Collective Bargaining Agreement" (C4). He added that he places "an average of five calls a day to Management trying to resolve grievances without hearings to the benefit of [Union] members . . ." (C4). LaSane described his responsibilities as essentially the same as Kirkland's (T291).

Furthermore, LaSane has been informally designated by Gerace as Local 54's affirmative action officer (T327). In

this capacity, LaSane handles discrimination complaints which emanate from any of the casino hotels (T337-338). LaSane testified that he has familiarized himself with the rules and regulations pertinent to affirmative action (T327) and has acquainted himself with agencies and organizations which may complement his efforts in resolving discrimination complaints (T328, 338).

LaSane identified himself as an "agent" on his Labor Organization Disclosure Form (D1).

We find that Kirkland and LaSane are both "agents" within the meaning of N.J.A.C. 19: 41-12.1. It is clear to us that both represent Union members working within the casino industry in employment matters. Although the Division contends that they are also "principal employees," we will not decide this issue.

Since Kirkland and LaSane are agents, we must determine whether either is disqualified pursuant to section 86.

Kirkland has a criminal record which consists of five convictions. We note that Kirkland filed his Labor Organization Individual Disclosure Form with the Commission on June 19, 1981. Consequently, section 86(c)(1) containing a list of disqualifying offenses from the "New Jersey Code of Criminal Justice," L. 1978, c. 95 (Title 2C of the New Jersey Statutes) is controlling. *See, In the Matter of the Application of Robert A. Ferrin for Licensure as a Casino Employee*, Docket No. 79-EA-207 (1981) at 10-12.

On May 7, 1964, Kirkland was convicted in United States District Court for the District of New Jersey of unlawfully selling a narcotic drug, namely 168 milliograms of cocaine, in violation of 26 U.S.C.A. §§4704(a) and 7237(a) (D3). This offense is comparable to a high misdemeanor under

N.J.S.A. 24:21-19(b)(1). *See,* N.J.S.A. 24:21-6(c)(4). Accordingly, we find that this offense is a listed disqualifying offense pursuant to section 86(c)(3) of the Act.

On November 1, 1968, Kirkland was convicted of possession of narcotics in violation of N.J.S.A. 24:21-20 (D4). This offense is not listed as a disqualifying offense in sections 86(c)(1), or (3).

On July 8, 1969, Kirkland was convicted of grand larceny contrary to the provisions of N.J.S.A. 2A:119-2 (D5). Although this offense is listed in section 86(c)(2), we find insufficient support in the record to conclude that it is a disqualifying offense pursuant to section 86(c)(1).

In 1975, Kirkland was indicted on six counts for sale of lottery tickets, possession of lottery paraphernalia and engaging as a lottery clerk in violation of N.J.S.A. 2A:121-1 and 3 (D6). The record of the criminal proceeding indicates that Kirkland was found guilty and sentenced to "a term of not less than two and no more than three years on each count, sentence to run concurrently . . ." (D6). We are unable to tell with certainty from this record the offense for which he was convicted or much of the factual circumstances surrounding these offenses. Section 86(c)(2) indicates that the commission of any offense under 2A:121-1 *et seq.* constitutes a disqualifying offense, but we are unable to find that these offenses are disqualifying pursuant to section 86(c)(1).

Lastly, on September 15, 1976, Kirkland pled guilty to possession of lottery slips and permitting a lottery on his premises in violation of N.J.S.A. 2A:121-3(b) and (c) (D7). Again, the record will not permit us to convert these offenses to comparable offenses listed in Section 86(c)(1).

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Since Kirkland has four convictions for offenses which are not specifically disqualifying, we would ordinarily undertake an "inimical analysis" pursuant to section 86 (c)(4) which considers whether these offenses indicate that Kirkland's licensure would be inimical to the Act or to casino operations. Such analysis would consider a number of factors including the nature of the offense, the surrounding events, the remoteness of the offense, and the offender's conduct since that offense. *In the Matter of the Application of Resorts International for a Casino License,* Docket No. 79-CL-1 (1979) at 15. However, in light of our subsequent discussion and conclusion, we think it is unnecessary to reach specific findings in this regard.

Section 93(b) provides that "[t]he commission may for the purpose of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require."

Furthermore, section 86(c)(4) states:

> . . . the automatic disqualification provisions of this subsection shall not apply with regard to any conviction which did not occur within the 10-year period immediately preceding application for licensure and which the applicant demonstrates by clear and convincing evidence does not justify automatic disqualification . . .

Kirkland was released from prison sometime in 1978 (T225, 257). The record indicates that since that time he has been wholly free from any criminal involvement. Kirkland is now fifty years of age (T254; D8).

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Carroll Edmonson, executive director of the Atlantic City Human Relations Commission, testified that he has known Kirkland of approximately four years (T370) and has found him to be an honest and forthright individual (T371).

Donald Young, an officer in the National Society of Volunteers of America, also testified on behalf of Kirkland. The Volunteers of America operate several halfway houses which attempt to help ex-offenders become assimilated into society (T385). Mr. Young stated that he had known Kirkland for a little less than a year (T390), but in that short span Kirkland had been instrumental in assisting several ex-offenders procure employment in the casino industry (T386). Young stated that he had a high opinion of Kirkland and felt that he was an excellent example for the young men who have just been released from prison and are attempting to rebuild their lives (T387).

Lastly, Arrawanna Allen, an affirmative action specialist with the City of Atlantic City, indicated that she has worked with Kirkland on several occasions and always found him to be courteous and professional in their dealings (R2).

The Commission was impressed by Kirkland, and found him to be a man who wished to put his criminal experiences behind him and live a better life. His testimony was entirely credible. We are persuaded that he has rehabilitated himself and should be permitted to continue to work in his current position. Accordingly, we find that there is clear and convincing evidence that Kirkland's automatically disqualifying conviction which occurred more than 10 years before he filed his application does not justify disqualification under section 86

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(c)(4). We further resolve to waive Kirkland's other offenses pursuant to section 93(b).

The Division also alleges that Kirkland should be disqualified on the basis of a nondisclosure pursuant to section 86(b). Kirkland disclosed only his 1969 larceny conviction and his 1975 lottery conviction in response to question 10 on his Labor Organization Individual Disclosure Form, which requests an applicant to report all criminal convictions (D8). Kirkland explained that Lumio had instructed him, when he gave him the form, to put down his most recent convictions (T243). Kirkland testified that he did not intend to mislead anyone by his failure to include his other convictions (T 244). We note that question 10 on the registration form provides space for only two answers. However, a full page is provided at the end of the form for the purpose of supplementing incomplete answers (*see*, D8, at 11).

It is well settled that nondisclosure of criminal offenses on an application form will support disqualification pursuant to section 86(b) when the nondisclosure is intentional or evinces a conscious disregard for the regulatory process. *In the Matter of the Application of Resorts International Hotel, Inc., for a Casino License*, Docket No. 79-CL-1 (1979), at 13.

We believe that the nondisclosures were inadvertent. We also note that Kirkland revealed two of his most recent and most serious offenses. Kirkland indicated that he was not attempting to conceal his undisclosed convictions. We think this testimony was candid and honest and we have already found him to be a thoroughly credible witness and see no reason to disturb that conclusion here.

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Lastly, the Division asserts that Kirkland is a career offender and should be disqualified on the basis of section 86(f). In view of our discussion above, we think little need be said with regard to this issue beyond the simple conclusion that we do not believe that Kirkland should be disqualified as a career offender. Accordingly, with regard to Kirkland, we find no valid basis for his disqualification.

LaSane was convicted in United States District Court for the District of New Jersey on May 21, 1973, of interference with commerce (extortion), aiding and abetting and conspiracy in violation of 18 U.S.C.A. §1951 (D2). He was a Commissioner of the City of Atlantic City, specifically the Director of Parks and Public Property, from May 21, 1968 until the time of his indictment (D2). According to the indictment, LaSane obstructed and delayed the construction of public projects, purchases of goods, property and services, and the licensing of firms which sought to do business with the City of Atlantic City in order to obtain monies from contractors, engineers, property owners, suppliers and licensees "by the wrongful use of fear and under color of official right" (D2). LaSane served one year and twenty-one days for this offense (T329).

The Division contends that this offense disqualifies LaSane pursuant to sections 86(c)(1), (c)(4) and (e). However, during the course of the hearing it came to light that the Division had apparently taken a different position on the matter in considering another application submitted by LaSane (C2). LaSane had previously submitted an application for a casino hotel employee license. The application was filed with the Commission on April 7, 1981 (C1). LaSane disclosed his conviction

on this application form just as he did on his Labor Organization Individual Disclosure Form (D1).

Some background is necessary to fully understand what occurred. On February 15, 1982, amendments to the Casino Control Act became effective which eliminated the licensure requirement for casino hotel employees and established a registration requirement in its stead. L. 1977, c.110. By virtue of these amendments, upon petition by a casino licensee or temporary casino permittee a person could begin employment as a casino hotel employee after he has filed an application for casino hotel employee registration. *See,* N.J.S.A. 5:12-91(f). Under the registration system the evaluation of the suitability of a casino hotel employee occurs after he is eligible for employment, rather than before, as under the licensure system.

The amendments to the Act further provided that any person who had a completed application for a casino hotel employee license pending before the Commission would be considered registered. N.J.S.A. 5:12-91(f). LaSane therefore became registered with the Commission and eligible for employment on the effective date of the amendments.

In an internal memorandum dated March 24, 1982, the Division indicated that it had reviewed LaSane's qualifications and determined that there was no cause to disturb his status as a casino hotel employee registrant (C2).

The Division's position that LaSane is qualified as a hotel registrant was not taken as part of the hearing on the instant matter. That position was merely expressed in an internal Division memorandum. None of the parties took any action in reliance on the Division's position with re-

gard to LaSane's suitability as a hotel registrant or would in any way be prejudiced by allowing the Division to take a different position as to LaSane's fitness to serve as a union agent. We find that the Division memorandum listing LaSane as a satifactory registrant has no bearing on the matter before us. Accordingly, we now consider whether LaSane's conviction will disqualify him pursuant to the provisions of the Act.

The Division contends that LaSane is disqualified pursuant to section 86(c)(1) since his federal conviction is analogous to listed disqualifying offenses, namely, N.J.S.A. 2C:5-2 (conspiracy), N.J.S.A. 2C:20-5 (theft by extortion), N.J.S.A. 2C:27-2 (bribery in official and political matters), N.J.S.A. 2C:27-4 (compensation for past official behavior), N.J.S.A. 2C:27-6 (gifts to public servants), N.J.S.A. 2C:27-7 (compensating public servant for assisting private interests in relation to matters before him), N.J.S.A. 2C:30-2 (official misconduct) and N.J.S.A. 2C:30-3 (speculating or wagering on official action or information). The Division further contends that LaSane is disqualified on the basis of sections 86(c)(4) and 86(e). LaSane filed his Labor Organization Individual Disclosure Form with the Commission in June 1981 (D1).

As previously indicated, LaSane has been convicted of interference with commerce (extortion), aiding and abetting and conspiracy. We find that the offense for which LaSane was convicted is the equivalent of a violation of N.J.S.A. 2C:20-5(d), which is a disqualifying offense listed in section 86(c)(1). We find that LaSane was acting in his official capacity as a Commissioner of the City of Atlantic City when he committed the acts which constitute the federal offense. We further note the repetitive nature of his criminal acts.

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LaSane was convicted of a particularly noxious crime in our view. He had obviously attained a measure of success as a City Commissioner, but he perverted his office and abandoned the trust reposed in him by the voting public.

Carroll Edmonson, mentioned above, testified on behalf of LaSane. Edmonson stated that LaSane has an excellent reputation for honesty and integrity in the community (T373). He added that it was his view that LaSane was thoroughly rehabilitated (T374).

Furthermore, several letters were introduced into evidence on behalf of LaSane (R1, R2, R3, R4, R5, R6 and R7). These letters attest to LaSane's good character, courage and integrity. The letters were authored by: Gene L. Hudgins (R1), Arrawanna Allen (R2), Isaac S. Cole, Pastor of the Second Baptist Church in Atlantic City (R3), Barbara L. Hudgins (R4), Pierre Hollingsworth, president of the Atlantic City branch of the NAACP (R5), Carroll Edmonson (R6), and Reverend Leroy T. Griffith (R7).

We have listened to LaSane testify before us and have assessed his credibility. We are not convinced that the public policy of the Act or the interests of justice require a waiver of his disqualification.

Considering our conclusion, we believe it is unnecessary to determine whether LaSane's federal conviction is analogous to the host of other listed offenses proposed by the Division. Nor do we deem it necesary to consider disqualification under section 86(c)(4) or 86(e).

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Conclusion

For all of the reasons herein stated we find Frank Gerace and Frank Materio are disqualified under section 86(f) and that Karlos LaSane is disqualified under section 86(c). We wish to afford all interested parties a reasonable opportunity to effect the removal of Gerace, Materio and LaSane as officers, agents or principal employees of Local 54 before taking remedial steps as provided by section 93(b). We will therefore issue an order providing that, in the event Gerace, Materio or LaSane is an officer, agent or principal employee of Local 54 as of October 12, 1982, Local 54 will be thereafter prohibited from receiving dues from any employee licensed or registered under the Casino Control Act and employed by a casino licensee or its agent. Our order will further require the parties to submit briefs by October 5, 1982, addressing the interpretation and applicability to this case of the additional statutory prohibitions against "administ[ration of] any pension or welfare funds." N.J. S.A. 5:12-93(b). In the briefs the parties shall discuss what discretion the Commission may exercise in regard to the remedial provisions of section 93(b), whether the cessation of dues collection and the cessation of administration of pension and welfare funds are alternative remedies, and whether in fact Local 54 is engaged in the administration of pension or welfare funds. On this last point the parties may make whatever written factual submissions they deem appropriate. In its brief the Division shall make clear what remedial action it will request the Commission to take in the event that Gerace, Materio or LaSane is an officer, agent or principal employee of Local 54 as of October 12, 1982.

Appendix D

SEPARATE OPINION OF COMMISSIONER JACOBSON

I respectfully disagree with the majority opinion insofar as it finds Frank Gerace, Frank Materio and Karlos LaSane disqualified under sections 86(c) and (f).

Frank Gerace and Frank Materio

I agree with the findings of the majority concerning the organized crime involvement of Nicodemo Scarfo, Nicholas Virgilio, Philip Leonetti, *et al.* The evidence in this respect is conclusive.

It is also apparent that an association between Frank Gerace, Frank Materio and Nicodemo Scarfo has existed.

The issue to be determined by this Commission is whether this association is "inimical" to the policy of the Casino Control Act and to gaming operations.

In my judgment, the evidence submitted in this proceeding is insufficient to justify such a conclusion.

It is always distressing to observe any degree of association between law-abiding citizens and mob-related felons. It is particularly gnawing when high-ranking union officials, charged with the obligation of serving as trustees for the welfare of their members, permit such associations to exist, for any reason.

One would normally expect militant trade union leaders dedicated to the principles of democratic trade unionism to seek close, personal relations with individuals and organizations determined to fight for social and economic justice, not to have associations with mob-related, tyrannical oppressors, motivated by personal greed.

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The association of Frank Gerace and Frank Materio and the others whom they have appointed to positions in Local 54 to Scarfo, *et al.* is distressing. However, the evidence concerning their associations does not lead me to conclude that the unseen hand of Scarfo is at work in this Union.

Each of the individuals appointed to positions within the Union has long been at work in the industry and each has emerged from the Union's rank and file membership.

Gerace was a waiter (T1778) and rose through Local 508 to his present position in Local 54. Materio was and still is a bartender (T1599). Lumio (T1779) and Daidone (D126, at 25) were bartenders. Erace was a maitre d' (T1725). There is no probative evidence that Scarfo caused these persons to be appointed to their positions with the Union or has had any influence over the manner in which they have performed their union duties. Local 54 presented sixteen witnesses, including members of the union employed in casino hotels, other respected union leaders, casino industry representatives, attorneys specializing in labor law and persons active in community affairs, all of whom praised Local 54 and its leadership as active, aggressive and effective representatives of the membership. This evidence was uncontradicted.

All of these witnesses portrayed Gerace as a vigorous and dedicated union leader (T2186; 2211). He was further characterized as a tough negotiator with extensive knowledge of the casino industry (T2037-2038).

Both Gerace and Materio were described by three members of the Union as always being helpful and recep-

tive to the Union membership and as having unquestioned reputations for honesty.

Father Vincent Pasquale, a Catholic priest and director of the Alcoholic Council Service, testified that Gerace has an untarnished reputation for honesty and integrity.

As for the business associations, John Rich of the Bricklayers Union, who is also president of the Building Trades Council of Atlantic and Cape May Counties, said that Toro Construction is a large and well-run business, and "a contractor that bids legitimately for legitimate jobs" (T2216; *see also,* T2217-2218). Rich also said Toro was one of four or five union contractors he recommended to Gerace for the headquarters renovation job. The job was apparently awarded by bid (T1693), and there is no reason to question the *bona fides* of the building process or of the cost of the renovations.

As to Affiliated Leasing, Robert Wayne testified that the vehicle leases were entirely legitimate.

With regard to the other two business associations, Casale and Sausto, there is likewise no evidence of impropriety.

In summary, there has been no reliable or substantial evidence before this Commission of any influence, any impropriety, or any crime.

In fact the majority so states:

> It is true that no direct evidence was presented during these proceedings that any of the appointments or business associations resulted from Scarfo's influence and that in a few instances, such as Toro Construction, there is some contrray evidence.

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> We are also aware that the record is silent as to whether any of the Scarfo-related appointees have acted illegally or otherwise impropery in the conduct of the Local's affairs or that any of the business associations were other than legitimate.

While an association between Gerace, Materio and Scarfo, *et al.* has been established, there is no proof anywhere in this proceeding that any of the appointees has conducted any Union business in a manner violative of the law, or contrary to the best interests of the membership of Local 54, or that any of the business transactions were in any way improper. Nor is there anything else that would clearly indicate the fact of influence.

Given these facts and these conclusions, by what stretch of logic does the majority determine that any of these assocations is "inimical" to the policy of the Casino Control Act or gaming activities in New Jersey?

The conclusion one must reach is that the majority believes that while the Scarfo influence on Local 54 cannot be proved by hard evidence today, there is always the possibility that his association with Gerace and Materio could be "inimical" at some point in the future. If this is the logic of the disqualification order, it is based upon an abandonment of American democratic traditions.

Are we to condemn an innocent individual today, because at some distant future time, he *may* commit an impropriety?

The Casino Control Act states:

> An integral and essential element of the regulation and control of casino facilities by the State rests in

> the public confidence and trust in the credibility and integrity of the regulatory process. [N.J.S.A. 5:12-(b)(6)]

If this Commission employs the faulty premise of guilt-by-association, discards the traditional presumption of innocence, and condemns on the testimony of faceless, unexamined informers, we will do more than undermine the credibility and integrity of the regulatory process.

We will do violence to the credibility and integrity of the democratic process.

Finally, I agree with the majority that no inferences can or should be drawn from Gerace's failure to testify. Gerace has a right to remain silent, a right which the Supreme Court has described as an "essential mainstay" of our Constitutional system, *Malloy* v. *Hogan*, 378 U.S. 1, 7 (1964) and, based on the record before us, I do not think his constitutionally-protected silence should be given any evidential significance.

In its reply brief (page 9), the Division argues that Gerace's answers to the following questions would clearly indicate the extent of any Scarfo influence:

> Who would know whether or not meetings or phone calls with Scarfo ever took place?
>
> Who would know why such contacts occurred and what was discussed on each occasion?
>
> Who would know whether such contacts had any influence on the policies or actions of Local 54, and whether they presented any danger to the casino gaming industry?

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And then the Division reasons:

> The answer to all these questions is that Frank Gerace would know, but he refuses to answer questions on these topics, contending that to do so would incriminate him.

The Division is correct in posing these questions but less than persuasive in reaching such a conclusion in its reply brief.

The fact is that Gerace did testify for four days at a deposition conducted by the Division. The deposition testimony was taken under a grant of immunity, *see,* N.J.S.A. 5:12-67, and the transcript was sealed.

Thus, this Commission has had no access to, and therefore has no knowledge of Gerace's deposition testimony. *But, the Division knows how Gerace answered every question posed to him during that deposition* and could easily have procured his testimony for the Commission's consideration by making another request for immunity, which the Commission obviously would have granted. Our ability to afford all parties a full and fair hearing would have been greatly enhanced if the Division had requested immunity and thus, provided us with Gerace's testimony.

Karlos LaSane

I endorse much of the majority's opinion with regard to LaSane. However, I would reach a different conclusion concerning his rehabilitation.

LaSane was convicted on May 21, 1973. This is his only criminal offense in a life spanning fifty years. LaSane testified that he served one year and twenty-one days for the

offense and was released sometime in 1975 (T329). He also testified that he successfully completed his parole approximately two years later (T330).

Since that time, LaSane has been free of criminal involvement. LaSane testified that following his release from prison he became employed as a counsellor with the Narcotic Addicts Rehabiltation Center Organization (NARCO) (T322), and that he worked for this organization for four years (T324).

LaSane was then employed by the Atlantic Housing Development Corporation as a field representative (T325). He stated that this program was funded by the federal government and when the funds dried up he became employed with the American Civil Liberties Union (T324).

Following his employment with the ACLU, LaSane collected unemployment (T325). Then, in May 1981, he commenced his present employment with Local 54. Furthermore, as the majority notes, seven members of the Atlantic City community have indicated their support for LaSane and offered their opinion that he is a man of honesty and integrity.

I find that the singularity of the offense, although admittedly a serious crime, the nearly continuous work record since his release, and the contemporaneous, uncontradicted statements made on his behalf, indicate that LaSane does not warrant so harsh a penalty as the majority prescribes. I would find that LaSane is rehabilitated and I woul waive his disqualification pursuant to section 93(b).

Appendix D

Conclusion

For all of the above reasons, I find that the Division has not proven that Gerace and Materio are disqualified under section 86(f) or that LaSane is disqualified under section 86(c).

Commissioner Thomas joins Commissioner Jacobson's opinion with regard to Karlos LaSane.

APPENDIX E

Order of New Jersey Casino Control Commission

STATE OF NEW JERSEY
CASINO CONTROL COMMISSION

Docket No. 81-LO-1

September 28, 1982

In the Matter of

THE HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION NO. 54

This matter having been opened to the Commission by the Division of Gaming Enforcement, Robert Sturges, Acting Director, appearing, and Bernard N. Katz, Esq., Meranze, Katz, Spear & Wilderman, Esqs., having appeared on behalf of Hotel and Restaurant Employees and Bartenders International Union Local 54, and Ronald F. Kidd, Esq., Duane, Morris, Heckscher, Esqs., having appeared on behalf of Frank Gerace, and the Commission having held a hearing, and having found that Frank Gerace and Frank Materio are disqualified under N.J.S.A. 5:12-86(f), and that Karlos LaSane is disqualified under N.J.S.A. 5:12-86(c), and good cause having been shown,

It is on this 28th day of September, 1982, Ordered that: Frank Gerace, Frank Materio and Karlos LaSane

be removed as officers, agents or principal employees of Hotel and Restaurant Employees and Bartenders International Union Local 54 by October 12, 1982; and

FURTHER ORDERED that: In the event Frank Gerace, Frank Materio or Karlos LaSane is an officer, agent or principal employee of Local 54 as of October 12, 1982, Local 54 will hereafter be prohibited from collecting dues from any employee licensed or registered under the Casino Control Act and employed by a casino licensee or its agent; and

FURTHER ORDERED that: By October 5, 1982, the parties shall submit briefs in accordance with the terms of the opinion issued this day by the Commission.

NEW JERSEY CASINO CONTROL COMMISSION

By:

DON M. THOMAS, Acting Chairman

MARTIN B. DANZIGER, Commissioner

CARL ZEITZ, Commissioner

MADELINE H. MCWHINNEY, Commissioner

APPENDIX F

Supplemental Opinion of New Jersey Casino Control Commission

STATE OF NEW JERSEY
CASINO CONTROL COMMISSION

Docket No. 81-LO-1

October 12, 1982

In the Matter of

THE HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION NO. 54

NEW JERSEY CASINO CONTROL COMMISSION

Don M. Thomas, Acting Chairman
Joel R. Jacobson, Commissioner
Madeline H. McWhinney, Commissioner
Carl Zeitz, Commissioner

APPEARANCES:

For the Casino Control Commission:

John R. Zimmerman, Senior Assistant Counsel
Timothy J. O'Neill, Assistant Counsel

Appendix F

For the Division of Gaming Enforcement:

Robert B. Sturges, Acting Director
James F. Flanagan, III, Deputy Director
Gary A. Ehrlich, Deputy Attorney General
Mitchell A. Schwefel, Deputy Attorney General
Eugene M. Schwartz, Deputy Attorney General

For Local 54:

Bernard N. Katz, Esq.
Michael Katz, Esq.
Meranze, Katz, Spear & Wilderman, Esqs.

For Frank Gerace:

Ronald F. Kidd, Esq.
Duane, Morris, Heckscher, Esqs.

Section 93 of the Casino Control Act provides that any labor organization which seeks to represent persons licensed or registered under the Act and employed by a casino hotel or casino licensee must register annually with this Commission. N.J.S.A. 5:12-93(a). Hotel and Restaurant Employees and Bartenders International Union Local 54 represents approximately 14,000 waiters, kitchen workers, bartenders, porters and other hotel workers, the large majority of whom are employed in the casino hotels in Atlantic City and are licensed by or registered with the Commission. Thus, the Union is required to register under section 93, and it has done so.

Section 93 further provides:

b. No labor organization, union or affiliate registered or required to register pursuant to this sec-

> tion and representing or seeking to represent employees licensed or registered under this act may receive any dues from any employee licensed or registered under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent or principal employee of the labor organization, union or affiliate is disqualified in accordance with the criteria contained in section 86 of this act. [N.J.S.A. 5:12-86].

The Division of Gaming Enforcement filed letter reports with the Commission alleging that certain officers, agents or principal employees of Local 54 were disqualified under section 86. Following a hearing, the Commission issued an opinion in which it found that three such persons were in fact disqualified, one because of his criminal record (sections 86(c)), and two because of their organized crime associations (section 86(f)). Therefore, on September 28, 1982, the Commission issued an order requiring Local 54 to remove the three individuals as officers, agents or principal employees by October 12, 1982. The order further provided that if any of these persons remained an officer, agent or principal employee as of October 12, Local 54 would thereafter be prohibited from receiving dues from any employee licensed or registered under the Act and employed by a casino licensee or its agent. Finally, the order required the parties to file briefs by October 5, 1982, addressing the interpretation and applicability to this case of the additional statutory prohibitations against "administ[ration of] any pension or welfare funds.." Specifically, the parties were directed to discuss what discretion the Commission may exercise in regard to the remedial provisions of section 93(b), whether cessation of dues collection and cessation of administration of

pension and welfare funds are alternative remedies, and whether in fact Local 54 is engaged in the administration of pension or welfare funds. On this last point the parties were permitted to make whatever written factual submissions they deemed appropriate.

In its brief the Division argues that the Commission has the discretion to utilize either one or both of the section 93(b) remedies, depending on the facts of the particular case before it. As to the present case, the Division asserts that, due to Local 54's refusal to cooperate in its investigative efforts, it lacks sufficient information to determine if Local 54 administers pension or welfare funds within the meaning of section 93(b) and the regulations adopted pursuant thereto. The Division suggests that a supplemental hearing be held in order to determine whether Local 54 administers pension and welfare funds and, if so, whether the Commission should take any remedial action in this regard.

Local 54 did not comply with the Commission's order to file a brief on these issues.

In construing section 93(b) we must bear in mind that "the purpose of construction is to bring the operation of the statute within the apparent intention of the Legislature." *Sperry and Hutchinson Co.* v. *Margetts,* 15 N.J. 203, 209 (1954). "[T]he words in a statute must be interpreted in context to serve the spirit of the law," *Bd. of Education, Asbury Park* v. *Hoek,* 38 N.J. 213, 231 (1962), and ultimately "[i]t is not the words but the internal sense of the law that controls." *Wollen* v. *Fort Lee,* 27 N.J. 408, 418 (1958); *accord, Riccio* v. *N.J. Mfrs. Ins. Co.,* 179 N.J. Super. 65, 70, (App. Div. 1981); *Newark* v. *Dept. of Civil Service,* 68 N.J. Super. 416, 428 (App. Div. 1961). As stated in *N.J. Builders, etc. Ass'n* v. *Blair,* 60 N.J. 330, 338 (1972):

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> In reading and interpreting a statute, primary regard must be given to the fundamental purpose for which the legislation was enacted. Where a literal rendering will lead to a result not in accord with the essential purpose and design of the act, the spirit of the law will control the letter.

In determining te legislative intent behind section 93(b) we must consider the legislative history of this section, *State* v. *Madden*, 61 N.J. 377, 389 (1972); *In Re Meadowlands Communications Systems, Inc.*, 175 N.J. Super. 53, 65 (App. Div. 1980), *certif. den.* 85 N.J. 455 (1980), and must also read this section in the context of the Act as a whole. *Seatrain Lines, Inc.* v. *Medina*, 39 N.J. 222, 226 (1963); *Petition of Scheffeld Farms Co.*, 22 N.J. 548, 554 (1956).

The purpose of section 93(b) is clearly revealed in the legislative history. Prior to the enactment of the Casino Control Act, the Commission of Investigations of the State of New Jersey advised the Legislature that the casino industry would be a "vulnerable target for criminal intrusion" and that there were "few better vehicles" for organized crime to gain a stronghold in the industry than control of labor unions. *Report and Recommendations on Casino Gambling by the Commission of Investigations of the State of New Jersey* (1977), at 1-H. The Commission of Investigations recommended that labor union officials be subject to disqualification criteria, and explained:

> The provision is intended to exclude members of organized crime and other unsavory individuals from effecting [*sic*] the casino industry through labor organizations. [*Id.* at 2-H].

Similarly, the *Second Interim Report of the Governor's Staff Policy Group on Casino Gambling* (1977), recommended that the Casino Control Act contain disqualification provisions for officials of casino industry labor unions, and stated:

> Without interfering with legally protected organizational or bargaining activities, the state must assure that these activities are conducted by individuals of integrity. [*Id.* at 46].

Of course, the recommendations of the Commission of Investigations and the Staff Policy Group were followed and section 93 was adopted. We have no doubt that the purpose of section 93 is to prevent persons disqualified under the section 86 criteria from utilizing labor unions as a means of gaining a foothold in the casino industry. It is equally clear that the purpose of the section 93(b) remedies is to give the Commission the means to effect the removal of disqualified persons from positions of authority within labor unions. In order that the legislative intent can best be carried out the Commission must have the discretion to use the section 93(b) remedies either separately or in conjunction, as may be necessary to insure the removal of disqualified persons in a given case.

Our conclusion that we have discretion in applying the section 93(b) remedial provisions is buttressed by reading this section in the context of the Casino Control Act as a whole. The Legislature has provided that the Commission "may exercise any proper power or authority necessary to perform the duties assigned to it by law," and that "no specific enumeration of powers in this Act shall be read to limit the authority of the Commission to administer this Act." N.J.S.A. 5:12-75. Indeed, in

denying Local 54's motion to preliminarily enjoin the Commission from enforcing sections 93 and 86 against the Union, Judge Brotman recognized that the Commission would have discretion in fashioning a remedy if it found any officer, agent or principal employee of Local 54 to be disqualified. *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danzinger (sic), et al.*, 536 F. Supp. 317, 330 (D.N.J. 1982).

In summary, we conclude that the Legislature intended to invest the Commission with broad discretion in the administration of the section 93(b) remedies, so as to enable the Commission to achieve the purposes of section 93 without unnecessarily interfering with the legitimate rights of union members. Specifically, we conclude that the section 93(b) sanctions can be applied singly or jointly, depending on the facts and circumstances of a given case. In the present case we have ordered the removal of three union officials and have made it clear that failure to heed this order will result in a prohibition against dues collection. At present we think this action is sufficient to effect the removal of the disqualified persons and we see no need to invoke the pension and welfare fund provisions of section 93(b). In addition, we are not in a position to invoke those provisions, not having held a hearing or made findings about Local 54's pension and welfare fund activities and the effect that our curtailment of those activities might have on the union membership. In view of the fact that the United States District Court has enjoined the Commission, pending appeal, from enforcing section 93 against Local 54, we have no immediate plans to hold such a hearing.

Appendix F

NEW JERSEY CASINO CONTROL COMMISSION
By:
DON M. THOMAS, Acting Chairman
MADELINE H. MCWHINNEY, Commissioner
CARL ZEITZ, Commissioner

Dated: October 12, 1982.

Appendix F

SEPARATE OPINION OF COMMISSIONER JACOBSON

I have decided, after considerable thought, not to sign the foregoing majority opinion.

It is not that I disagree with the legal analysis or legal conclusions contained in the opinion with regard to the statutory construction of section 93. I do, however, disagree with the majority's predecessor opinion in this matter and I am therefore disinclined to join an opinion which, in my view, implicitly endorses the earlier decision.

JOEL R. JACOBSON
Commissioner

APPENDIX G

Judgment of United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

for the Third Circuit

Nos. 82-5210, 5234, 5260

Entered June 6, 1983

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54; and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 331,

Intervenor,

vs.

MARTIN DANZIGER, ACTING CHAIRMAN; DONALD THOMAS, COMMISSIONER; MADELINE McWHINNEY, COMMISSIONER; CARL ZEITZ, COMMIS-

---

SIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY; G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY.

On Appeal From The United States District Court
For The District Of New Jersey

Present: Gibbons, Higginbotham and Becker, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel November 15, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered March 22, 1982 and appealed at No. 82-5210 be, and the same is hereby reversed and the cause remanded to the said District Court for the entry of an order enjoining the Commission and the Division from taking any action, pending final hearing to enforce section 93 against the Union. It is further ordered and

adjudged that the cross appeals, Nos. 82-5234 and 82-5260, are dismissed for lack of jurisdiction. Costs taxed against appellees in No. 82-5210; costs taxed against appellants in Nos. 82-5234 and 82-5260.

Attest:

Sally Mavos
Clerk

June 6, 1983

APPENDIX H

Order on Rehearing of United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

for the Third Circuit

Nos. 82-5210, 5234, 5260

Entered June 30, 1983

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54; and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 331,

Intervenor,

vs.

MARTIN DANZIGER, ACTING CHAIRMAN; DONALD THOMAS, COMMISSIONER; MADELINE McWHINNEY, COMMISSIONER; CARL ZEITZ, COMMIS-

---

Appendix II

SIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY; G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY.

SUR PETITION ON REHEARING

Present: Seitz, *Chief Judge*,

Aldisert, Adams, Gibbons, Hunter, Weis, Garth Higginbotham, Sloviter and Becker, *Circuit Judges.*

The petitions for rehearing filed by appellants Casino Control Commission, et al. and Division of Gaming Enforcement, et al. in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Appendix H

Judges Hunter, Weis, Garth, Sloviter and Becker would grant rehearing. A statement by Judge Adams Sur Petition for Rehearing is attached.

By the Court,

JOHN J. GIBBONS
Judge

Dated: June 30, 1983

ADAMS, Circuit Judge, statement sur petition for rehearing.

This appeal presents an extremely important issue concerning the proper balance of state and federal authority over labor unions in the casino industry, an industry which by its very nature must be regulated carefully and perhaps extensively by state governments. The decision by this Court not to rehear this matter *in banc*, should not be taken as a sign that it considers the matter unworthy of careful scrutiny by the full Court. Rather, I believe that the determination not to consider this case *in banc* may be understood as an acknowledgement of the thorough discussions set forth in the majority and dissenting opinions which have laid out the arguments for each side in considerable detail.

Because this appeal raises a question central to the concept of federalism, it would appear most appropriate, at least to me, that it be addressed at the first opportunity by the Supreme Court, so that all federal courts would have the benefit of guidance by the nation's highest tri-

bunal on this crucial topic. Given the magnitude of a state's interest in regulating an industry such as the casino industry, and the contention vigorously advanced that such regulation does not inexorably stand as an obstacle to the purposes and objectives of the Congress in the labor area, whether the National Labor Relations Act preempts a provision such as section 93 of the Casino Control Act would seem a question worthy of full exploration by the Supreme Court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX I

Notices of Appeal to Supreme Court of the United States

UNITED STATES COURT OF APPEALS

for the Third Circuit

Nos. 82-5210, 5234, 5260

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54; and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Plaintiffs-Appellants
and Cross-Appellees,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 331,

Intervenor,

vs.

MARTIN DANZIGER, ACTING CHAIRMAN; DONALD THOMAS, COMMISSIONER; MADELINE McWHINNEY, COMMISSIONER; CARL ZEITZ, COMMIS-

---

SIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY; G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Defendants-Appellees
and Cross-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that G. Michael Brown, Director, Department of Law and Public Safety, Division of Gaming Enforcement, State of New Jersey; Department of Law and Public Safety, Division of Gaming Enforcement, State of New Jersey; and Thomas Kean, Governor, State of New Jersey, the Defendants-Appellees/Cross-Appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Third Circuit entered on June 6, 1983.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

IRWIN I. KIMMELMAN
Attorney General of New Jersey

Appendix I

By: GARY A. EHRLICH
Deputy Attorney General

Attorneys for Department of Law and Public Safety, Division of Gaming Enforcement, State of New Jersey et al.

Richard J. Hughes Justice Complex
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(609) 292-9394

Dated: July 18, 1983

Received and Filed
July 20, 1983
Sally Mrvos, Clerk
United States Court of
Appeals for the Third Circuit

Appendix I

UNITED STATES COURT OF APPEALS

for the Third Circuit

Nos. 82-5210, 5234, 5260

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54; and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Plaintiffs-Appellants
and Cross-Appellees,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 331,

Intervenor,

vs.

MARTIN DANZIGER, ACTING CHAIRMAN; DONALD THOMAS, COMMISSIONER; MADELINE McWHINNEY, COMMISSIONER; CARL ZEITZ, COMMISSIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY; G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF

Appendix I

LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Defendants-Appellees
and Cross-Appellants.

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } ss.:

AFFIDAVIT OF SERVICE

GARY A. EHRLICH, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am a Deputy Attorney General of the State of New Jersey, and I represent the Department of Law and Public Safety, Division of Gaming Enforcement, State of New Jersey et al. in connection with the above-entitled matter.

2. On the 18th day of July, 1983, I caused to be served a true copy of the Notice of Appeal to the Supreme Court of the United States annexed hereto by depositing the same in the United States Post Office in the Richard J. Hughes Justice Complex, 25 Market Street, Trenton, New Jersey, with first-class postage prepaid, addressed to the following attorneys:

Appendix I

Bernard N. Katz, Esq.
Meranze, Katz, Spear & Wilderman
1200 Lewis Tower Building
15th and Locust Streets
Philadelphia, Pennsylvania 19102

Robert J. Genatt, Esq.
General Counsel
New Jersey Casino Control
Commission, et al.
3131 Princeton Pike
Building No. 5
CN-208
Trenton, New Jersey 08625

3. The attorneys named in paragraph (2) hereof represent all other parties who appeared in the above-entitled matter before the United States Court of Appeals for the Third Circuit, thus all parties required to be served have been served.

GARY A. EHRLICH
Deputy Attorney General

Sworn and subscribed to
before me this 18th day of July,
1983.

MITCHELL A. SCHWEFEL
An Attorney-at-Law of the
State of New Jersey

Appendix I

UNITED STATES COURT OF APPEALS

for the Third Circuit

Nos. 82-5210, 82-5234 and 82-5260

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54; and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Plaintiffs-Appellants/
Cross-Appellees

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 331,

Intervenor,

vs.

MARTIN DANZIGER, ACTING CHAIRMAN; DONALD THOMAS, COMMISSIONER; MADELINE McWHINNEY, COMMISSIONER; CARL ZEITZ, COMMISSIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY; G. MICHAEL BROWN, DIRECTOR, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAM-

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ING ENFORCEMENT, STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY.

Defendants-Appellees/
Cross-Appellants

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the State of New Jersey, Casino Control Commission, the Defendants-Appellees/Cross-Appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Third Circuit entered on June 6, 1983.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

ROBERT J. GENATT, General Counsel
New Jersey Casino Control Commission

By JOHN R. ZIMMERMAN
Senior Assistant Counsel

Attorney for State of New Jersey,
Casino Control Commission

Princeton Pike Office Park
Building No. 5, CN-208
Trenton, New Jersey 08625
(609) 292-7584

Dated: August 3, 1983

Received and Filed
July 20, 1983
Sally Mrvos, Clerk
United States Court of
Appeals for the Third Circuit

Appendix I

UNITED STATES COURT OF APPEALS

for the Third Circuit

Nos. 82-5210, 82-5234 and 82-5260

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54; and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Plaintiffs-Appellants/
Cross-Appellees

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 331,

Intervenor,

vs.

MARTIN DANZIGER, ACTING CHAIRMAN; DONALD THOMAS, COMMISSIONER; MADELINE McWHINNEY, COMMISSIONER; CARL ZEITZ, COMMISSIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY; G. MICHAEL BROWN, DIRECTOR, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAM-

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ING ENFORCEMENT, STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Defendants-Appellees/
Cross-Appellants

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } SS.:

AFFIDAVIT OF SERVICE

JOHN R. ZIMMERMAN, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am a Senior Assistant Counsel with the New Jersey Casino Control Commission and I represent the Commission in the above entitled matter.

2. On August 2, 1983, I caused to be mailed a true copy of the Notice of Appeal to the Supreme Court of the United States annexed hereto to the following, via regular United States mail:

Bernard N. Katz, Esq.
MERANZE, KATZ, SPEAR & WILDERMAN
1200 Lewis Tower Building
15th and Locust Streets
Philadelphia, Pennsylvania 19102

Appendix I

Thomas R. O'Brien, Director
Division of Gaming Enforcement
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

3. The attorneys named in paragraph (2) hereof represent all other parties who appeared in the above-entitled matter before the United States Court of Appeals for the Third Circuit, thus all parties required to be served have been served.

John R. Zimmerman

Sworn and Subscribed to
before me this 2nd day of
August, 1983.

Timothy O'Neill
An Attorney at Law of New Jersey

APPENDIX J

The National Labor Relations Act, §7, 29 U.S.C. §157 (1976)

The National Labor Relations Act, §7, 29 U.S.C. §157 (1976), entitled "Right of employees as to organization, collective bargaining, etc.," provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

APPENDIX K

The Labor-Management Reporting and Disclosure Act of 1959, §504, 29 U.S.C. §504 (1976)

The Labor-Management Reporting and Disclosure Act of 1959, §504, 29 U.S.C. §504 (1976), entitled "Prohibition against certain persons holding office," provides:

> (a) Membership in Communist Party; persons convicted of robbery, bribery, etc.
>
> No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve—
>
> (1)as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, or
>
> (2) as a labor relations consultant to a person engaged in an industry or activity affecting commerce, or as an officer, director, agent, or employee (other than as an employee performing exclusively clerical or custodial duties) of any group or association of employers dealing with any labor organization,
>
> during or for five years after the termination of his membership in the Communist Party, or for

five years after such conviction or after the end of such imprisonment, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the Board of Parole of the United States Department of Justice determines that such person's service in any capacity referred to in clause (1) or (2) would not be contrary to the purposes of this chapter. Prior to making any such determination the Board shall hold an administrative hearing and shall give notice of such proceeding by certified mail to the State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The Board's determination in any such proceeding shall be final. No labor organization or officer thereof shall knowingly permit any person to assume or hold any office or paid position in violation of this subsection.

(b) Penalty for violations

Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(c) Definitions

For the purposes of this section, any person shall be deemed to have been "convicted" and under the disability of "conviction" from the date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event, regardless of whether such conviction occurred before or after September 14, 1959.

APPENDIX L

The Employee Retirement Income Security Act of 1974, §411, 29 U.S.C. §1111 (1976)

The Employee Retirement Income Security Act of 1974, §411, 29 U.S.C. §1111 (1976), entitled "Persons prohibited from holding certain positions," provides:

> (a) Conviction or imprisonment
>
> No person who has been convicted of, or has been imprisoned as a result of his conviction of, robbery, bribery, extortion, embezzlement, fraud, grand larceny, burglary, arson, a felony violation of Federal or State law involving substances defined in section 802(6) of title 21, murder, rape, kidnaping, perjury, assault with intent to kill, any crime described in section 80a-9(a)(1) of title 15, a violation of any provision of this chapter, a violation of section 186 of this title, a violation of chapter 63 of title 18, a violation of section 874, 1027, 1503, 1505, 1506, 1510, 1951, or 1954 of title 18, a violation of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401), or conspiracy to commit any such crimes or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element, shall serve or be permitted to serve—
>
> (1) as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee of any employee benefit plan, or
>
> (2) as a consultant to any employee benefit plan,
>
> during or for five years after such conviction or after the end of such imprisonment, whichever is

the later, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the Board of Parole of the United States Department of Justice determines that such person's service in any capacity referred to in paragraph (1) or (2) would not be contrary to the purposes of this subchapter. Prior to making any such determination the Board shall hold an administrative hearing and shall give notice to such proceeding by certified mail to the State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The Board's determination in any such proceeding shall be final. No person shall knowingly permit any other person to serve in any capacity referred to in paragraph (1) or (2) in violation of this subsection. Notwithstanding the preceding provisions of this subsection, no corporation or partnership will be precluded from acting as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee, of any employee benefit plan or as a consultant to any employee benefit plan without a notice, hearing, and determination by such Board of Parole that such service would be inconsistent with the intention of this section.

(b) Penalty

Any person who intentionally violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(c) Definitions

For the purposes of this section:

(1) A person shall be deemed to have been "convicted" and under the disability of "conviction" from the date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event.

(2) The term "consultant" means any person who, for compensation, advises or represents an employee benefit plan or who provides other assistance to such plan, concerning the establishment or operation of such plan.

(3) A period of parole shall not be considered as part of a period of imprisonment.

APPENDIX M

The Employee Retirement Income Security Act of 1974, §514, 29 U.S.C. §1144 (1976), *as amended by* Act of January 14, 1983, Pub. L. No. 97-473, §§301(a), 302(b), 96 Stat. 2611, 2613 (1983)

The Employee Retirement Income Security Act of 1974, §514, 29 U.S.C. §1144 (1976), *as amended by* Act of January 14, 1983, Pub. L. No. 97-473, §§301(a), 302(b), 96 Stat. 2611, 2613 (1983), entitled "Other laws," provides:

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established

under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev.Stat. §§393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a)—

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health

Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.

(6)(A) Notwithstanding any other provision of this section—

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides—

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002(1) and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph(A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action

having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

APPENDIX N

New Jersey Statutes Annotated §5:12-86 (West Supp. 1983-1984)

New Jersey Statutes Annotated §5:12-93 (West Supp. 1983-1984), entitled "Registration of labor organizations," provides:

> a. Each labor organization, union or affiliate seeking to represent employees licensed or registered under this act and employed by a casino hotel or a casino licensee shall register with the commission annually, and shall disclose such information to the commission as the commission may require, including the names of all affiliated organizations, pension and welfare systems and all officers and agents of such organizations and systems; provided, however, that no labor organization, union, or affiliate shall be required to furnish such information to the extent such information is included in a report filed by any labor organization, union, or affiliate with the Secretary of Labor pursuant to 29 U.S.C. §§ 431 et seq. or 1001 et seq. if a copy of such report, or of the portion thereof containing such information, is furnished to the commission pursuant to the aforesaid federal provisions. The commission may in its discretion exempt any labor organization, union, or affiliate from the registration requirements of this subsection where the commission finds that such organization, union or affiliate is not the certified bargaining representative of any employee licensed or registered under this act, is not involved actively, directly or substantially in the control or direction of the representation of any such employee, and is not seeking to do so.

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b. No labor organization, union or affiliate registered or required to be registered pursuant to this section and representing or seeking to represent employees licensed or registered under this act may receive any dues from any employee licensed or registered under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent, or principal employee of the labor organization, union or affiliate is disqualified in accordance with the criteria contained in section 86 of this act. The commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require.

c. Neither a labor organization, union or affiliate nor its officers and agents not otherwise individually licensed or registered under this act and employed by a casino licensee may hold any financial interest whatsoever in the casino hotel or casino licensee whose employees they represent.

APPENDIX O

New Jersey Statutes Annotated §5:12-86 (West Supp. 1983-1984)

New Jersey Statutes Annotated §5:12-86 (West Supp. 1983-1984), entitled "Casino license—disqualification criteria," provides:

> The commission shall deny a casino license to any applicant who is disqualified on the basis of any of the following criteria:
>
> a. Failure of the applicant to prove by clear and convincing evidence that the applicant is qualified in accordance with the provisions of this act;
>
> b. Failure of the applicant to provide information, documentation and assurances required by the act or requested by the commission, or failure of the applicant to reveal any fact material to qualification, or the supplying of information which is untrue or misleading as to a material fact pertaining to the qualification criteria;
>
> c. The conviction of the applicant, or of any person required to be qualified under this act as a condition of a casino license, of any offense in any jurisdiction which would be under New Jersey law at the time of application a violation of any of the following provisions of law:
>
> (1) With respect to convictions obtained pursuant to the "New Jersey Code of Criminal Justice," P.L.1978, c. 95 (Title 2C of the New Jersey Statutes) as amended and supplemented:

all crimes of the first degree;

N.J.S. 2C:5-1 (attempt to commit an offense which is listed in this paragraph);

N.J.S. 2C:5-2 (conspiracy to commit an offense which is listed in this paragraph);

N.J.S. 2C:11-4b. (manslaughter);

N.J.S. 2C:12-1b. (aggravated assault which constitutes a crime of the second or third degree);

N.J.S. 2C:15-1 (robberies);

N.J.S. 2C:17-1a. and b. (crimes involving arson and related offenses);

N.J.S. 2C:17-2a. and b. (causing or risking widespread injury or damage);

N.J.S. 2C:18-2 (burglary which constitutes a crime of the second degree);

N.J.S. 2C:20-1 et seq. (theft and related offenses which consitute crimes of the second and third degrees);

N.J.S. 2C:20-7 (receiving stolen property);

N.J.S. 2C:21-1 et seq. (forgery and fraudulent practices which constitute crimes of the second and third degrees);

N.J.S. 2C:21-4a (falsifying or tampering with records);

N.J.S. 2C:21-14 (receiving deposits in a failing financial institution);

N.J.S. 2C:27-1 et seq. (bribery and corrupt influence);

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N.J.S. 2C:28-1 et seq. (perjury and other falsification in official matters which constitutes a crime of the third and fourth degrees);

N.J.S. 2C:30-2 and N.J.S. 2C:30-3 (misconduct in office and abuse in office which constitutes a crime of the second degree);

N.J.S. 2C:37-1 et seq. (gambling offenses which constitute crimes of the third and fourth degrees);

N.J.S. 2C:37-7 (possession of a gambling device);

(2) With respect to convictions obtained under Title 2A of the New Jersey Statutes:

N.J.S. 2A:85-5 (attempt to commit an offense with is in this paragraph);

N.J.S. 2A:89-1 et seq. (arson and other burnings);

N.J.S. 2A:90-1 et seq. (assault and battery);

N.J.S. 2A:91-1 et seq. (banks and financial corporations);

N.J.S. 2A:93-1 (bribery of judge or magistrate; acceptance of bribe);

N.J.S. 2A:93-2 (bribery of legislators; acceptance by legislators or other persons);

N.J.S. 2A:93-4 (soliciting or receiving award for official vote);

N.J.S. 2A:93-6 (giving or accepting bribes in connection with government work, service, etc.);

N.J.S. 2A:93-10 (giving or promising bribe to participants in sporting contest);

Appendix O

N.J.S. 2A:93-13 (giving or promising bribe to referee, umpire or other official in sporting contest);

N.J.S. 2A:94-1 (breaking and entering or entering);

N.J.S. 2A:94-2 (use of high explosives in breaking or entering);

N.J.S. 2A:98-1 (conspiracy to commit an offense which is enumerated in this paragraph);

N.J.S. 2A:99-1 (obstructing execution of process; assaulting officers);

N.J.S. 2A:102-1 et seq. (embezzlement, conversion and misappropriation);

N.J.S. 2A:103-1 et seq. (embracery);

N.J.S. 2A:105-1 et seq. (extortion, threats and unlawful takings);

N.J.S. 2A:108-9 (narcotic drugs; persuading others to use);

N.J.S. 2A:109-1 to N.J.S. 2A:109-3, N.J.S. 2A:109-6 to N.J.S. 2A:109-9 (forgery and counterfeiting);

N.J.S. 2A:111-1 to N.J.S. 2A:111-3, N.J.S. 2A:111-5 to N.J.S. 2A:111-15, N.J.S. 2A:111-18 to N.J.S. 2A:111-21.1, N.J.S. 2A:111-23 and N.J.S. 2A:111-24, N.J.S. 2A:111-28 to N.J.S. 2A:111-32, N.J.S. 2A:111-34 to N.J.S. 2A:111-35, N.J.S. 2A:111-37 to N.J.S. 2A:111-46 (frauds and cheats);

N.J.S. 2A:112-1 et seq. (gaming);

N.J.S. 2A:113-1 (murder);

N.J.S. 2A:113-5 (manslaughter);

N.J.S. 2A:114-2 (incestuous conduct between parent and child);

N.J.S. 2A:118-1 et seq. (kidnapping);

N.J.S. 2A:119-1 to N.J.S. 2A:119-5, P.L. 1965, c. 52 (C. 2A:119-5.1 et seq.) (larceny and other stealings);

N.J.S. 2A:119-8 (stealing narcotic drugs; breaking and entering with intent to steal);

P.L.1968, c. 349 (C. 2A:119A-1 et seq.) (loansharking);

N.J.S. 2A:121-1 et seq. (lotteries);

N.J.S. 2A:125-1 et seq. (mayhem);

N.J.S. 2A:131-1 to N.J.S. 2A:131-3 (perjury and subornation of perjury);

N.J.S. 2A:135-3 (public officers or employees unlawfully obtaining state, county, municipal or school district funds);

N.J.S. 2A:138-1 et seq. (rape and carnal abuse);

N.J.S. 2A:139-1 et seq. (receiving stolen property);

N.J.S. 2A:141-1 (robbery);

N.J.S.2A:143-2 (sodomy with children under 10);

P.L.1957, c. 49 (C. 2A:148-22.1) (giving false information to law enforcement officer or agency);

(3) any high misdemeanor under section 19 of P.L.1970, c. 226 (C. 24:21-19) or

(4) any other offense which indicates that licensure of the applicant would be inimical to the policy of this act and to casino operations; provided, however, that the automatic disqualification provisions of this subsection shall not apply with regard to any conviction which did not occur within the 10-year period immediately preceding application for licensure and which the applicant demonstrates by clear and convincing evidence does not justify automatic disqualification pursuant to this subsection and any conviction which has been the subject of a judicial order of expungement or sealing and provided, further however, that, any applicant or any person required to be qualified under this act as a condition of a casino license who is disqualified on the basis of paragraph (2) herein shall not be so disqualified if such applicant or person demonstrates to the commission by clear and convincing evidence that the act or acts which constitute the offense which forms the basis for such disqualification would not form the basis for a disqualification pursuant to paragraph (1) of this section;

d. Current prosecution or pending charges in any jurisdiction of the applicant or of any person who is required to be qualified under this act as a condition of a casino license, for any of the offenses enumerated in subsection c. of this section; provided, however, that at the request of the applicant or the person charged, the commission shall defer decision upon such application during the pendency of such charge;

e. The pursuit by the applicant or any person who is required to be qualified under this act as a condition of a casino license of economic gain in an occupational manner or context which is in violation of the criminal or civil public policies of this State, if such pursuit creates a reasonable belief that the participation of such person in casino operations would be inimical to the policies of this act or to legalized gaming in this State. For purposes of this section, occupational manner or context shall be defined as the systematic planning, administration, management, or execution of an activity for financial gain;

f. The identification of the applicant or any person who is required to be qualified under this act as a condition of a casino license as a career offender or a member of a career offender cartel or an associate of a career offender or career offender cartel in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this act and to gaming operations. For purposes of this section, career offender shall be defined as any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this State. A career offender cartel shall be defined as any group of persons who operate together as career offenders;

g. The commission by the applicant or any person who is required to be qualified under this act as a condition of a casino license of any act or

acts which would constitute any offense under subsection c. of this section, even if such conduct has not or may not be prosecuted under the criminal laws of this State; and

h. Contumacious defiance by the applicant or any person who is required to be qualified under this act of any legislative investigatory body or other official investigatory body of any state or of the United States when such body is engaged in the investigation of crimes relating to gaming, official corruption, or organized crime activity.